TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 439.

THOMAS BATTLE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES COURT OF CLAIMS.

(20641)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 438.

THOMAS BATTLE, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

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1 United States Circuit Court. May term, 1907.

UNITED STATES OF AMERICA,
Western Division, Southern District of Georgia.

The grand jurors of the United States, selected, chosen, and sworn in and for the Western Division of the Southern District of Georgia, upon their oaths present:

First count.

That heretofore, to wit, on the 16th day of May, in the year of our Lord one thousand nine hundred and seven, one Thomas Battle, late of said division and district, within said division and district, and within the jurisdiction of this court, within certain territory within the city of Macon, to wit, the land upon the corner of Third and Mulberry streets, jurisdiction over which had theretofore been ceded by the legislature of the State of Georgia to the United States of America for the erection of a public building to be used for the post-office, court-house, and other public purposes, and which territory was on the 16th day of May, A. D. 1907, then and there a place under the sole and exclusive jurisdiction of said United States and out of the jurisdiction of any particular State, did then and there wilfully, unlawfully, deliberately, feloniously, and of his malice aforethought with a certain iron bolt which he, the said Thomas Battle, then and there held in his hand, the said iron bolt then and there being an instrument likely to produce death, make an assault upon one D. M. Berry, whose further given name is to the grand jurors aforesaid unknown, he the said D. M. Berry being then and there in the peace of the United States, and did then and there strike the said D. M. Berry upon the head with the aforesaid iron bolt, thereby inflicting mortal wounds upon the said D. M. Berry, from the effects of which mortal wounds the said D. M. Berry did then and there die; and so the jurors aforesaid upon their oaths aforesaid do say that he, the said Thomas Battle, in the manner and form aforesaid, within the territory aforesaid, and out of the jurisdiction
2 of any particular State and within the jurisdiction of this court, wilfully, unlawfully, feloniously, and of his malice aforethought the said D. M. Berry did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Second count.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at the time and place and within the jurisdiction in the first count of this indictment set forth the said Thomas Battle did then and there wilfully, unlawfully, deliberately, feloniously, and of his malice aforethought with a certain iron bolt which he, the said Thomas Battle, then and there held in his hand, the said

iron bolt then and there being an instrument likely to produce death, make an assault upon one D. M. Berry, whose further given name is to the grand jurors aforesaid unknown, he the said D. M. Berry being then and there in the peace of the United States, and did then and there strike the said D. M. Berry upon the head with the aforesaid iron bolt, the effect of which blows did then and there cause the said D. M. Berry to fall from the top of the third story of the building then and there in course of erection violently to the ground, the effect of which fall did then and there break the neck of the said D. M. Berry, from which the said D. M. Berry did then and there die. And so the grand jurors aforesaid upon their oaths aforesaid do say that he, the said Thomas Battle, in the manner and form aforesaid, within the territory aforesaid, and out of the jurisdiction of any particular State and within the jurisdiction of this court, wilfully, unlawfully, feloniously, and of his malice aforethought the said D. M. Berry did kill and murder, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

ALEXANDER AKERMAN,
Assistant U. S. Attorney.

3 Indorsed: United States Circuit Court, Western Division, Southern District of Georgia. The United States vs. Thomas Battle. Indictment for murder. A true bill. O. P. Willingham, foreman. May 18th, 1907. 5339. Filed May 18th, 1907. Cecil Morgan, deputy clerk.)

4 UNITED STATES OF AMERICA,
Western Division, Southern District of Georgia:

The President of the United States to the marshal of the Southern District of Georgia and for his deputies or any or either of them:

Whereas at a Circuit Court of the United States of America for the Southern District of Georgia, begun and held at the city of Macon, within and for the Southern District of Georgia aforesaid, on the 18th day of May, in the year of our Lord one thousand nine hundred and seven, the grand jurors in and for the said Western Division, Southern District of Georgia, brought into the said court a true bill of indictment against one Thomas Battle, late of the county of Bibb, State of Georgia, for having within the jurisdiction of said court, within certain territory within the city of Macon, to wit, the land upon the corner of Third and Mulberry streets, jurisdiction over which had therefore been ceded by the legislature of the State of Georgia to the United States of America for the erection of a public building to be used for the post-office, court-house, and other public purposes, on the 16th day of May A. D. 1907, then and there wilfully, unlawfully, deliberately, and feloniously and of his malice aforethought, with a certain iron bolt, being an instrument likely to produce death, make an assault upon one D. M. Berry, and did then and there strike the said D. M. Berry upon the head with the aforesaid iron bolt, thereby inflicting mortal wounds upon the said D. M.

Berry, from the effects of which mortal wounds the said D. M. Berry did then and there die, and he, the said Thomas Battle, did then and there kill the said D. M. Berry in manner and form aforesaid and committed the crime of murder, as by the said indictment now remaining on file and of record in the said court may more fully appear, to which indictment the said Thomas Battle has not yet appeared or pleaded.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Thomas Battle and bring his body before the said court at the United States courtroom in the city of Macon to answer the indictment aforesaid, and to be further dealt with as the law directs. Herein fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of Supreme Court of the United States, at Macon, this 18th day of May, in the year of our Lord one thousand nine hundred seven, and in the 131st year of the independence of the United States of America.

[L. S.]

L. M. ERWIN,
Deputy Clerk.

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Macon, Bibb County, within my district, on May 18th, A. D. 1907, I executed the within capias by taking into my custody the within-named defendant, and now have him before court as within I am commanded.

The return of George F. White, U. S. marshal.

Dated at Macon, Ga., this May 20, 1907.

By GEO. F. WHITE, *U. S. Marshal.*

(Indorsed: In the Cir. Court of the United States, Western Division, for the Southern District of Georgia. United States vs. Thomas Battle. Indictment. Charge, murder. Bench warrant. Issued 18th day of May, 1907. Returned 20th day of May, 1907. Cecil Morgan, deputy clerk.)

5 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES
vs.
THOMAS BATTLE. } Bill of indictment for murder. May term, 1907. Number 414. Demurrer.

And now comes Thomas Battle, the defendant in the above-stated case, before arraignment and plea pleaded to said bill of indictment and demurs in writing thereto on several grounds:

1. Because the Circuit Court of the United States for the Western Division of the Southern District of Georgia has no jurisdiction to try said case.

2. Because the State of Georgia alone has jurisdiction to try said case, as the crime alleged to have been committed was committed

within the jurisdiction of the State of Georgia and Bibb County, and not within the exclusive territory and jurisdiction of the United States Government.

3. Because the bill of indictment in said case does not charge any offense against the laws of the United States of America.

4. Because the bill of indictment in said case does not charge and allege that the crime was committed within the county of Bibb and State of Georgia.

5. Because the indictment in said case does not charge that the crime was committed with premeditation and deliberation in order to make it murder.

6. Because the bill of indictment in said case does not allege and set out the act of the Georgia legislature ceding the territory upon which the new Government building is now being erected to the United States Government.

6 7. Because the Circuit Court has no right to try this defendant for murder. The crime, if any has been committed, is a crime against the State's sovereign government of Georgia and not against the Government of the United States.

8. Because the bill of indictment in said case does not allege and set up any title to said property and territory upon which the alleged crime was committed.

Wherefore the defendant prays that these his grounds for a demurrer be inquired into and that the bill of indictment be quashed against him and that he be discharged from the further custody of the United States authorities in said case.

JOHN R. COOPER,
Attorney for Thomas Battle.

The facts in the foregoing demurrer are sworn to as true and correct this June 3rd, 1907.

THOS. BATTLE.

Subscribed and sworn to before me this June 3rd, 1907.
CECIL MORGAN, *Deputy Clerk.*

The within demurrer to the indictment coming on to be heard, after argument thereupon by counsel for the defendant and for the Government, upon consideration of the court it is ordered and adjudged that said demurrer be, and the same is hereby, overruled as to each and every ground thereof.

Let the defendant plead over to said indictment.

In open court this June 3rd, 1907.

EMORY SPEER, *Judge.*

May term, 1907. Circuit Court of the United States for the Western Division of the Southern District of Georgia. United States vs. Thomas Battle, murder. Demurrer and order overruling. Filed June 3rd, 1907. Cecil Morgan, deputy clerk.

7 U. S. Circuit Court, Western Division of the Southern District of Georgia.

UNITED STATES } Indictment. Filed May 18, 1907. Murder. Plea,
vs. not guilty. Filed June 3, 1907.
THOMAS BATTLE. }

The defendant, Thomas Battle, having been formally arraigned, pleads not guilty in open court this 3rd day of June, 1907.

JOHN R. COOPER, *Deft's Atty.*

Filed June 3, 1907.

CECIL MORGAN, *Deputy Clerk.*

8 In the U. S. Circuit Court, Western Division, Southern District of Georgia.

UNITED STATES } Indictment. Filed May 18, 1907. Murder.
vs. Plea not guilty. Filed June 3, 1907. Ver-
THOMAS BATTLE. } dict, guilty. Filed June 6, 1907.

We, the jury, find the defendant guilty on the second count, without capital punishment, this 6th day of June, 1907.

F. H. ROBERSON, *Foreman.*

Filed June 6, 1907.

CECIL MORGAN, *Deputy Clerk.*

9 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES } Indictment for Murder. Verdict of guilty of
vs. murder without capital punishment. Motion
THOMAS BATTLE. } in arrest of judgment, #414. May term, 1907.

And now comes the defendant, Thomas Battle, in the above stated case, during said term and before the adjournment thereof, and within the time allowed by law, and being dissatisfied with the judgment of the court, moves the court to set aside the said judgment, and moves in arrest of judgment on the following grounds, to wit:

1. The Circuit Court erred in overruling the demurrer filed by defendant's counsel on all the grounds thereof as to the jurisdiction of the court to try said case.

2. Because the Circuit Court erred in not sustaining the written demurrer filed by defendant, claiming that the Circuit Court had no jurisdiction to try said case.

3. Because the Circuit Court erred in not sustaining the demurrer to the bill of indictment in said case, claiming that the Circuit Court had no jurisdiction over the prisoner.

4. Because the Circuit Court of the United States had no jurisdiction to try said case and it appeared so on the face of the bill of indictment.

5. Because the Circuit Court committed error in not directing a verdict of not guilty against the prisoner, Thomas Battle, on motion made by defendant's counsel at the close of the Government's evidence on the grounds that the evidence failed to show and
10 the record failed to show and the bill of indictment failed to show that the Circuit Court had jurisdiction to try the case.

6. Because the bill of indictment in said case and the record failed to show that the Circuit Court had exclusive jurisdiction over the prisoner at the bar.

7. Because the court erred in not quashing the bill of indictment in said case on motion of defendant's counsel and in not discharging the prisoner from the further custody of the United States authorities.

Wherefore the defendant, Thomas Battle, prays that these his grounds for a motion in arrest of judgment of the court in said case and to set aside the verdict of the jury be inquired into, and that the verdict of the jury and the judgment of the court be set aside and that he be held further not to answer to the judgment of the court, and that he be granted a new trial.

Respectfully submitted.

JOHN R. COOPER,
Counsel for Thomas Battle.

11 The foregoing grounds in arrest of judgment read and considered.

Let the motion in arrest of judgment be filed in the clerk's office.

It is therefore ordered and adjudged that Mr. Alexander Akerman, the district attorney for the southern district of Georgia, show cause before me instanter why this motion in arrest of judgment should not be granted.

This June 7, 1907.

EMORY SPEER, *Judge.*

Due and legal service of the within motion in arrest of judgment acknowledged and copy and all other and further services waived. This June 7th, 1907.

ALEXANDER AKERMAN,
Assistant U. S. Attorney.

Upon reading and considering the foregoing motion in arrest of judgment, counsel not desiring to argue the same, it is considered and adjudged by the court that said motion be, and the same is hereby, overruled on each and every ground thereof. In open court this June 7, 1907.

EMORY SPEER, *Judge.*

(Indorsed:) U. S. Cir. Ct., West. Div. So. Dist. of Georgia. Motion in arrest of judgement; order overruling. United States vs. Thomas Battle. Filed June 7, 1907. Cecil Morgan, deputy clerk.

12 In the United States Circuit Court for the Western Division, Southern District of Georgia.

THE UNITED STATES OF AMERICA *vs.* THOMAS BATTLE.	Indictment No. 414. Filed May 18, 1907. Sentenced June 7, 1907.

The prisoner, Thomas Battle, now present in court, having been charged on indictment No. 414 with having committed the offense of murder of one D. M. Berry in a place under the exclusive jurisdiction of the United States, within the city of Macon, in said division and district, as more fully appears by said indictment on file in the office of the clerk of said court, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States, and having been formally arraigned and having pleaded not guilty, and having been tried and convicted of said offense, and having been asked by the court, before sentence was pronounced, if he had anything to say why sentence of the law should not now be imposed, and the prisoner then and there saying nothing save what he had already said; and it having been in due form determined and ascertained that there is no penitentiary within the Southern District of Georgia suitable for the confinement of persons convicted of crimes in the courts of the United States in said district, and the Attorney-General of the United States having in due form, and by and with competent authority, designated the United States penitentiary at Atlanta, in the State of Georgia, as the place of confinement, subsistence, and employment of all persons convicted, or who may be hereafter convicted of crimes against the United States of America in said district, and such designation having been in due form notified to the court and entered upon the record thereof, and the court finding the same to be true, now here on motion of Alexander Ackerman, assistant United States attorney, it is considered ordered and adjudged by the court, by reason of the verdict of conviction herein, that the said Thomas Battle be imprisoned at hard labor in the United States penitentiary at Atlanta, in the State of Georgia, for the term of his natural life.

And it is further ordered and adjudged that the clerk issue a writ of commitment in due form of law and that the marshal transport the said Thomas Battle to the said United States penitentiary and deliver him, the said Thomas Battle, to the warden of the said United States penitentiary, and that the warden detain the said prisoner according to this sentence; and the clerk of this court immediately certify, under the seal of the court, and deliver to the marshal a copy of this judgment, sentence, and order with a copy of said writ of commitment to accompany the body of the said Thomas Battle and to be left therewith at the said United States penitentiary, and said copy to be warrant and authority for the transporta-

tion and imprisonment of the said Thomas Battle, as hereinbefore provided.

In open court this seventh day of June, A. D. 1907.

EMORY SPEER, *U. S. Judge.*

I certify the foregoing to be a true copy of an original judgment, sentence, and order of the said court on file and of record in my office.

Witness my official signature and the seal of the court at Macon, Georgia, this the seventh day of June, A. D. 1907.

[L. S. OF THE COURT.] CECIL MORGAN, *Deputy Clerk.*

In the Circuit Court of the United States, term, May, 1907.

UNITED STATES OF AMERICA,

Western Division, Southern District of Georgia.

The President of the United States to the keeper of the United States penitentiary at Atlanta, in the State of Georgia, greeting:

The prisoner, Thomas Battle, having been charged on indictment with having committed the offense of murder of one D. M Berry, in a place under the exclusive jurisdiction of the United States, within the city of Macon, in said division and district, as more fully appears by said indictment of file in the office of the clerk of said court, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States, and having been formally arraigned and having pleaded not guilty, and having been tried and convicted of said offense, and the court thereupon, to wit, on the 7th day of June, 1907, having sentenced the said Thomas Battle to be imprisoned in the United States penitentiary at Atlanta, in the State of Georgia, for the term of his natural life:

Now, therefore, you are hereby commanded, in the name of the President of the United States, to receive and commit to the said United States penitentiary at Atlanta, in the State of Georgia, the body of the said Thomas Battle, charged, convicted, and sentenced as aforesaid, and him safely keep until thence delivered by due process of law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said court, at Macon, Georgia, this 7th day of June, 1907.

[L. S. OF THE COURT.] CECIL MORGAN,

Deputy Clerk U. S. Circuit Court.

(Indorsed:) U. S. Circuit Court, Western Division, Southern District of Georgia. The United States vs. Thomas Battle. Original. Sentence to penitentiary. Filed in clerk's office this 7th day of June, 1907. Cecil Morgan, deputy clerk. Alexander Ackerman, Assistant U. S. Attorney. Marshal's return. I hereby certify that in obedience to within writ I did, on the 20th day of June, 1907, at Macon, in my district, take the body of the within named Thomas Battle, and did transport and deliver him, together with a copy of this writ, on the 20th day of June, 1907, into the custody of the warden of the United States prison at Atlanta, Georgia. George F. White, U. S. Marshal.

13 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES *vs.* THOMAS BATTLE. } Indictment for murder. Verdict of guilty without capital punishment. Motion in arrest of judgment No. 414. May term, 1907.

And now comes the defendant, Thomas Battle, in the above-stated case, during said term and the adjournment thereof, and within the time allowed by law, and being dissatisfied with the judgment of the court, moves the court to set aside the said judgment, and moves for a new trial on the following grounds, to wit:

1. Because the verdict of the jury in said case is contrary to law.

2. Because the verdict of the jury in said case is contrary to the evidence.

3. Because the verdict of the jury in said case is contrary to the charge of the court.

4. Because the verdict of the jury in said case is contrary to the weight of the evidence without evidence to support it.

5. Because the Circuit Court had no jurisdiction to try said case.

6. Because the court committed error in not directing a verdict of not guilty on motion of defendant's counsel when the evidence was closed by the Government, on the ground that the evidence showed that the Circuit Court had no jurisdiction to try the case.

7. Because the court committed error in declining to charge the jury in the following written request which was put in writing by defendant's counsel:

14 "Gentlemen of the jury, if you believe in this case that the defendant got into an altercation with the deceased on top of the Government building, in the city of Macon, and they became engaged in a fight, and during the fight the deceased, Berry, lost his footing and fell fifty-nine (59) feet to the ground, breaking his neck, and that defendant tried to catch him in falling, and that he had no intention to kill and murder deceased, then, gentlemen, I charge you you would be authorized to find defendant only guilty of involuntary manslaughter, the commission of a lawful act."

8. Because the court committed error in refusing to charge the jury in said case in the following written request, which was put in writing by defendant's counsel:

"That the burden is upon the Government throughout the entire case to prove the entire case; to prove every essential element of the case charged; and if you have any reasonable doubt, taking into consideration all the evidence that defendant, Thomas Battle, was sane at the time of the commission of the act charged, you will acquit.

"The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time *of* the homicide was committed Battle had a diseased mind and brain, and it was not partially diseased, or to some extent diseased, but diseased to the extent that he was incapable of forming all criminal intent, and the disease had

so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and control of his mental faculties were impaired so that the act done was an irresistible and uncontrollable impulse with him at the time he committed the act.

"If his brain was in this condition, he could not be punished by law. But if his brain was not in this condition, he could not be punished by law, remembering that the burden is upon the Government to establish that he was of sound mind; that by the term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act was committed at the time he was performing it was a wrongful act in violation of human law and he could be punished therefor and he did not perform the act because he was controlled by irresistible and uncontrollable impulse. In that state of case defendant could not be excused upon the ground of insanity, and it would be your duty to convict him.

"But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease, and the homicide was a homicide of such disease, and that he was incapable of forming a criminal intent, and he had no control over his faculties and the will power to control his actions, but simply slew Berry because he was laboring under a delusion which absolutely controlled him, and that his act was one of irresistible impulse and not of judgment—in that event he would be entitled to an acquittal."

9. Because the court committed error in charging the jury in said case.

10. Because the court committed error in overruling the written demurrer filed by defendant's counsel to the bill of indictment in said case on all the grounds thereof.

Wherefore defendant prays that these his grounds for a new trial be inquired into and that a new trial be granted to him.

JOHN R. COOPER,
Counsel for Thomas Battle.

The foregoing grounds for a motion for a new trial read and considered.

Let the motion for a new trial be filed.

It is therefore ordered and adjudged that Mr. Alexander Akerman, the United States district attorney of said court, show cause before me as soon as counsel can be heard why a new trial should not be granted in this case, and let the same be set for a hearing at chambers at Macon, Ga., on the day of June, 1907.

It is further ordered that the verdict of the jury and sentence of the court be suspended and superseded until further order of the court.

Let a copy of this rule nisi be served upon the district attorney. This 7th of June, 1907.

Due and legal service of the within motion for a new trial acknowledged and copy and all other and further services waived. This 7th of June, 1907.

ALEXANDER AKERMAN,
Assistant U. S. Attorney.

In open court, after hearing the within motion for a new trial, ordered that the same be, and is hereby, overruled and refused on all the grounds thereof.

This June 7, 1907.

EMORY SPEER, *Judge.*

(Indorsed:)—U. S. Cir. Ct., West. Div. So. Dist. Ga. Motion for new trial; order overruling. United States vs. Thomas Battle. Filed June 7, 1907. Cecil Morgan, deputy clerk.

17 UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

THE UNITED STATES
vs.
THOMAS BATTLE.

Petition for writ of error.

To the clerk of the Circuit Court of the United States for the Western Division of the Southern District of Georgia sitting at Macon:

Your petitioner, Thomas Battle, the defendant in the above-entitled cause, respectfully represents that at the May term, 1907, of this court he was convicted on a bill of indictment charging him with the crime of murder upon the post-office site at Macon, Georgia, and that said court has pronounced judgment and has sentenced your petitioner to the penitentiary for and during his natural life on the verdict of the jury finding him guilty of murder without capital punishment.

Your petitioner alleges that in the record and proceedings on the trial of this cause in said court there is great and manifest errors, to the prejudice and great damage of your petitioner. He therefore prays that a writ of error from the Supreme Court of the United States be issued by you under the seal of said court in said cause, remanding the said cause and a record therein to the Supreme Court in order that the same may be there examined, and, if error be found, that the said judgment and sentence against him therein be reversed.

JOHN RANDOLPH COOPER,
Counsel for Defendant, Thomas Battle.

(Indorsed:) United States vs. Thomas Battle. Petition for writ of error. Filed July 11, 1907. L. M. Erwin, deputy clerk. John R. Cooper, counsel for Thomas Battle.

18 *Writ of error.*

UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Western Division of the Southern District of Georgia:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, or some of you, in a cause entitled United States by indictment against Thomas Battle, a manifest error hath happened, to the great damage of the said Thomas Battle, as by his complaint appears, we, being willing that error, if any hath been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the city of Washington on the 10th day of August, 1907, in the said Supreme Court of the United States, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 11 day of July, in the year of our Lord one thousand nine hundred and seven.

19 [SEAL.] TOMLINSON F. JOHNSON,
Clerk of the Circuit Court of the United States for the Western Division of the Southern District of Georgia at Macon.
By LENOIR M. ERWIN, *Deputy Clerk.*

Allowed by:
EMORY SPEER,
United States District Judge holding the Circuit Court.

(Indorsed:) U. S. Cir. Ct., West. Div., So. District of Georgia. United States vs. Thomas Battle, murder. Writ of error. Filed July 11, 1907. L. M. Erwin, deputy clerk. John R. Cooper, counsel for Thomas Battle.

20 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

THE UNITED STATES vs. THOMAS BATTLE. } Number 414.

Assignments of error.

Afterwards, to wit, at the May term, 1907, of said Circuit Court, comes the said Thomas Battle by his attorney at law and says that in the record and proceedings in the above-entitled case there is manifest error in this, to wit:

1. The court erred in overruling the demurrer filed by the defendant to the indictment in said case.

2. The court erred in overruling the first ground of the demurrer filed by the defendant to the indictment in said case.

3. The court erred in overruling the second ground of the demurrer filed by the defendant to the indictment in said case.

4. The court erred in overruling the third ground of the demurrer to the indictment filed by the defendant in said case.

5. The court erred in overruling the fourth ground of the demurrer filed by the defendant to the indictment in said case.

6. The court erred in overruling the fifth ground of the demurrer filed by the defendant to the indictment in said case.

7. The court erred in overruling the sixth ground of the demurrer filed by the defendant to the indictment in said case.

8. The court erred in overruling the seventh ground of the demurrer filed by the defendant to the indictment in said case.

21 9. The court erred in overruling the eighth ground of the demurrer filed by the defendant to the indictment in said case.

10. The court erred in overruling the motion made by the defendant to direct a verdict of not guilty in said case.

11. The court erred in excluding from the jury the following evidence of the witness G. S. Wescott:

Q. What is his general character, good or bad?

Counsel of the defendant stating that he expected to prove by him the general character of the defendant was good and his character for truthfulness and honesty was good. The court excluded this evidence and restricted the defendant of proof of his general character for peaceableness and as a law-abiding man. Defendant says that the court erred in excluding said evidence and in so restricting the scope of the testimony in regard to general character. The court erred in not permitting defendant's counsel to prove the prisoner's record as a soldier and restricting the examination in regard to character of the defendant solely to defendant's character as a peaceable and law-abiding man.

12. The court erred in charging the jury as set out in the bill of exceptions.

13. The court erred in charging the jury as follows:

"You have of course observed that the crime charged is alleged to have been committed upon land to which the United States had title and on which exclusive jurisdiction has been ceded by the State of Georgia. You are instructed as a matter of law, and the law on this topic it is your duty to accept from and be guided by the instruction of the court, that if the United States had title to the place or lot in question, and if you further find that such lot was being used for

22 the erection of a needful public building of the United States thereon, viz, the post-office and court-house, as alleged in the indictment, since the State of Georgia has ceded to the United States exclusive jurisdiction thereon, the Circuit Court of the United States in which you are now empaneled has exclusive jurisdiction

for the trial of the crimes committed on such lot, and no other court has such jurisdiction on such lot and any office or building erected or in process of erection thereon. The deed under which the United States claims title is in evidence before you. The construction of the deeds and other instruments in writing also falls within the province of the court. You are instructed that this deed does convey title to the United States to the place or lot described in the indictment, and that the United States had title to such lot on the 16th day of May, and has title now. If you find from the evidence that on the date mentioned such lot was being used for the erection of a needful public building, the jurisdiction of the court is complete."

14. The court erred in charging the jury as follows:

"You are also instructed that when a building on a lot or place of which the United States has title, for which building an appropriation of the money of the United States has been made by act of Congress in a particular locality of the United States, by such act of appropriation it is declared by law and determined to be a needful public building. And you are also instructed as a matter of law that such act of appropriation had antecedently to the date of the alleged crime mentioned in the indictment been made by acts of Congress. These appropriation acts are public laws of which the court takes judicial cognizance, and it is the duty of the jury to be guided by such law and laws as stated to them by the court. The law being as stated, the only fact necessary to give the court jurisdiction is this, was the lot or place at the time of
23 the alleged crime being used for the purpose of erecting thereon a court-house and post-office of the United States. If you find from the evidence that this was true, then the court has jurisdiction to try the offense charged. The Government has the legal title to the lot or place, it is not in dispute that it was being used for the purpose of erecting a post-office and court-house thereon, as alleged in the indictment. Something was said during the argument or in the examination of witnesses to the effect that title to this property was in the contractors until the building was completed and turned over to the Government. This statement and contention, you are instructed, is wholly untenable, and as matter of law is not correct."

15. The court erred in charging the jury as follows:

"It is perhaps not essential, in view of the evidence in this case, to discuss generally the meaning of the term 'no considerable provocation' as used in this definition, but it is the law of the United States, and the law of Georgia as well, that 'provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killed from the guilt and crime of murder.' Indeed, this precise language is taken from a section of our own code. The term 'abandoned and malignant heart' in the sense of the law, as held by the Supreme Court of Georgia, may be evidenced by the use of a weapon or other appliance likely to produce death, and by brutal and bloodthirsty use of such instrumentality."

16. The jury found contrary to following charge:

"Every person who within any of the places or upon any of the waters described in section 5339 unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stab'ing, wounding, shoot-
24 ing or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

17. The court erred in charging the jury as follows:

"You should consider the testimony of the witnesses for the defendant. First, he began by attempted proof of good character; and the first witness, as I recall, sworn for the defendant was Mr. G. S. Wescott."

18. The court erred in charging the jury as follows:

"It is well settled, said the Supreme Court of the United States, that mere words, however aggravating, are not sufficient to reduce a crime from murder to manslaughter."

19. The court erred in charging the jury as follows:

"If you are satisfied from the evidence that Battle was not justified in assaulting Berry with the hoe handle as the latter was suspended by the rope in the air; and if then, because of that assault, Berry made up the rope towards him with a view of attaining a place of safety, or to resent the assault with the hoe handle, and if you further find that Battle had all the advantage because of relative position of the parties, he, having thus unlawfully brought on the conflict, would not be justified in using a deadly weapon and in taking the life of his assailant. At most, if those facts are found as just stated, would the jury be justified in considering whether they had the legal effect to reduce the killing from murder to manslaughter?"

20. The court erred in refusing to give in his charge to the jury the following charge which was requested by defendant in writing before the jury retired to consider their verdict:

"Gentlemen of the jury, if you believe in this case that the
25 defendant got into an altercation with the deceased on top of the Government building in the city of Macon, and they became engaged in a fight, and during that fight the deceased, Berry, lost his footing and fell 59 feet to the ground, breaking his neck, and that defendant tried to catch him in falling, and that he had no intention to kill and murder deceased, then, gentlemen, I charge you you would be authorized to find defendant only guilty of involuntary manslaughter in the commission of a lawful act."

21. The court erred in refusing to give in charge to the jury the following written request to charge, which was submitted by defendant before the jury retired to consider their verdict:

"That the burden is upon the Government throughout the entire case to prove the entire case, to prove every essential element of the case charged, and if you have any reasonable doubt, taking into con-

sideration all the evidence that defendant, Thomas Battle, was sane at the time of the commission of the act charged you will acquit. The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Battle had a diseased mind and brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent; and the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and center of his mental faculties were impaired, so that the act done was irresistible and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he can not be punished by law. But if his brain was not in this condition he can be punished by law, remembering that the burden is upon the
26 Government to establish that he was of sound mind; that by the term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act was committed at the time he was performing it was a wrongful act, in violation of human law, and he could be punished therefor, and he did not perform the act because he was controlled by irresistible and uncontrolable impulse. In that state of the case the defendant could not be excused upon the ground of insanity, and it would be your duty to convict him.

"But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease and the homicide was the product of such disease, and that he was incapable of forming a criminal intent and he had no control over his faculties and the will power to control his actions, but simply slew Berry because he was laboring under a delusion which absolutely controlled him and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled to an acquittal."

22. The court erred in refusing to charge the jury the law of justifiable homicide and in failing to instruct the jury upon the law of justifiable homicide.

23. The court erred in overruling the motion for a new trial filed by defendant in said case.

24. The court erred in overruling the motion in arrest of judgment filed by defendant in said case.

25. The court erred in overruling the 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th grounds of the motion in arrest of judgment filed by the defendant in said case.

26. The verdict and judgment in said case are erroneous because under the evidence adduced on the trial in behalf of the
27 United States the defendant could not have been convicted of a higher grade of homicide than manslaughter.

27. The court erred in interrupting the counsel for the defendant in his concluding argument to the jury and stating to counsel in the hearing of the jury that the argument he was making to the jury

was degrading to the administration of justice. This remark of the trial judge was prejudicial to the rights of the accused.

Wherefore the defendant prays that the verdict and judgment rendered in said Circuit Court be reversed and annulled and made to hold for nothing and that the d fendant may be restored to all things which he has lost by reason of said verdict and judgment and that such other judgment and direction be had from the honorable Supreme Court of the United States as may be necessary and proper in the premises.

This the 11 day of July, 1907.

JOHN RANDOLPH COOPER,
Attorney for Defendant Thomas Battle,
Post-Office Address, Macon, Ga.

(Indorsed:) U. S. Cir. Ct., West. Div., So. Dist. Georgia. Assignment of errors. United States vs. Thomas Battle. Filed July 11, 1907. L. M. Erwin, deputy clerk.

28 *Citation on writ of error.*

UNITED STATES OF AMERICA:

The President of the United States to the United States of America, greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, in the capital of the nation, on the 10th day of August, 1907, pursuant to writ of error filed in the clerk's office of the Circuit Court of the United States for the Western Division of the Southern District of Georgia, at Macon, in the Fifth Circuit, in a cause entitled United States by indictment versus Thomas Battle, wherein the said Thomas Battle, the plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Emory Speer, judge of the District Court of the United States for the Western Division of the Southern District of Georgia, holding said Circuit Court, this 11th day of July, in the year of our Lord one thousand nine hundred and seven.

EMORY SPEER,
United States District Judge, holding the Circuit Court.

29 Due and legal service of the within citation is hereby acknowledge and all other and further services waived.

This the 11th day of July, 1907.

MARION ERWIN,
United States Attorney for the Southern District of Georgia.
ALEXANDER AKERMAN,
Assistant U. S. Attorney, Southern District of Georgia.
R. E. STORRS,
Assistant U. S. Attorney, Southern District of Georgia.

On this the 17th day of July, 1907, personally appeared before me, the subscribed, John Randolph Cooper, and makes oath that he delivered a true copy of the within citation to Marion Erwin, district attorney for the Southern District of Georgia and the attorneys of record, Messrs. Alexander Akerman & R. E. Storrs, assistants.

Sworn to and subscribed before me this 17th day of July, 1907.

JOHN RANDOLPH COOPER,
Attorney for Plaintiff in Error.

C. M. Wiley, ordinary, Bibb County, Ga.
Filed July 19, 1907.

CECIL MORGAN, *Deputy Clerk.*

30 *Order requiring clerk to transmit transcript without cost to deft.*

UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES
vs.
THOMAS BATTLE. } Order.

Upon reading the affidavit of the defendant in this cause it is ordered that the clerk of this court prepare the transcript of the record for the Supreme Court and all necessary papers for the prosecution of the writ of error for Thomas Battle without cost to him.

EMORY SPEER,
United States District Judge, holding Circuit Court.

Filed July 11, 1907.

L. M. ERWIN, *Deputy Clerk.*

31 *Affidavit in forma pauperis to obtain transcript without costs.*

UNITED STATES OF AMERICA.

In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES
vs.
THOMAS BATTLE. } Affidavit.

Thomas Battle being duly sworn that he was tried, convicted, and sentenced for murder on the post-office site at Macon, Georgia, and that he is advised by counsel that there is error in the proceedings had upon said trial and he is desirous of having said trial and judgment reviewed by writ of error to the Supreme Court of the United States; that his counsel has prepared a bill of exceptions and has filed a petition for a writ of error and assignments of error for the purpose

of reviewing said sentence and judgment; and that he is utterly without means to pay the costs of prosecuting his writ of error and humbly prays this honorable court for an order that he be allowed to prosecute his writ of error without cost to him.

THOMAS BATTLE.

Sworn to and subscribed before me this the 20th day of June, 1907.

J. W. STOKES,
Notary Public and Justice of the Peace, Bibb County, Georgia.

Filed July 11, 1907.

L. M. ERWIN, *Deputy Clerk.*

32 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

THE UNITED STATES *vs.* THOMAS BATTLE. } No. 414.

Bill of exceptions.

Be it remembered that on the trial of this case in this court at the May term, 1907, of said court the Honorable Emory Speer, judge of the District Court of the United States for the Southern District of Georgia, presiding, the following proceedings were had, to wit:

A jury was impaneled and sworn according to law.

The defendant filed a demurrer to the indictment returned in said case, which said demurrer is of file as a part of the record in said case. The court overruled said demurrer, to which ruling of the court the defendant then and there excepted, and then and there excepted to the overruling of the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, and 8th grounds of said demurrer.

The court delivered an opinion in overruling said demurrer which was as follows, to wit:

33 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES OF AMERICA *vs.* THOMAS BATTLE. } Indictment for murder, demurrer. Alexander Akerman and Robert E. Storrs, for the Government; John Randolph Cooper, for the defendant.

(Opinion of the court, June 3, 1907.)

SPEER, Judge (orally):

The demurrer of the learned counsel for the defendant is not in favor of State sovereignty. It is in derogation of State sovereignty.

It is a contention that the State has not the right to cede its territory to the Government of the United States for the mutual benefit of the Government and the people of the State. Said the Supreme Court of the United States in Benson's case:

"In their relation to the General Government the States of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the General Government are essentially different from those of the State, they are not those of a different country, and the two—the State and General Government—may deal with each other in any way they deem best to carry out the purposes of the Constitution. It is for the protection and interests of the State, their people and property, and as well for the protection and interest of the people generally of the United States, that forts, arsenals, and other buildings for public uses are constructed within the State as instrumentalities for the execution of the powers of the General Government, which are, as already stated, taken from such control of the States as would defeat or impair their use for those purposes; and if for their more effective use a session of legislative authority and political jurisdiction of the State would be desirable, we do not perceive any objection to its grant by the legislature of the State."

And again:

"We also hold that it is competent for the legislature of a State to cede exclusive jurisdiction over places needed by the General Government in the execution of its powers, the use of the places being in fact as much for the use of the people of the State as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

34 Now, that is a fundamental and a philosophic statement of the relations between the State and the Government. In such matters the Congress of the United States has the power to establish a post-office. It, therefore, has the power to establish a building for the use of a post-office. It has been found necessary in the opinion of Congress to pass laws to protect the Government and the people of the States from the commission of crimes upon the territory or lot, or whatever it may be termed, which has been set apart for a post-office. It has been true, therefore, from the beginning that the policy of Congress in making preparations to buy land for the construction of public buildings for its use and for the common use of the people of the State has been to provide that exclusive jurisdiction shall be granted to the United States to punish crimes and otherwise to protect the Government, which is but another name for the people, in so far as that particular section is concerned.

In this case the legislature of our own State has passed an act the title of which is "An act to provide for the ceding of jurisdiction to the United States to and over a certain lot of land in the city of Macon, Bibb County, said State, when the United States Government shall acquire title thereto, for the purpose of erecting a public building thereon." Has not the State a right to do that? Its legislature

seems to think so; the Government seems to think so. The Supreme Court of the United States has held that it had that right, and the right is now for the first time challenged. It seems to me that argument upon that particular subject is concluded.

Now, the citation of the authority where the Supreme Court of the United States held that before Congress had made any law on the subject a battle ship or ship of war was not such a place as that contemplated by the law is not in point, and the distinction is
35 expressed in the very headnote of the decision itself. It is:

"The law does not extend to a ship of war, but only to what is in nature fixed territorially."

Is not the corner of Third and Mulberry streets fixed? It would be very difficult for anyone to move it, I imagine. It is a part of the territory formerly of the State of Georgia, and now of the United States, because the State of Georgia in the exercise of its sovereign power has ceded it. It is true that the State reserved the power to exercise its process there, for the reason that it does not want a public building to be a refuge for criminals. If a man who commits a crime flees to a public building, the police, sheriff, or deputy sheriffs can go there to seize him. There are no horns of the altar which he can take hold of there. The officers of the State can follow and take possession of him. But where a man commits a crime in that territory, the only place that has jurisdiction to try him is a court of the United States, provided the Congress of the United States has enacted legislation denouncing such crime and giving to the court jurisdiction to try it. We turn to section 5339 of the Revised Statutes, and we find that Congress has enacted that legislation. It provides:

"Every person who commits murder—

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States:

"Second. Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State:

"Third. Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies, either on land or at sea, within or without the United States, shall suffer death."

We turn to the Constitution. We find there authority for the enactment of the law for the erection of "forts, magazines, arsenals, dockyards, and other needful public buildings," which Congress is given the exclusive power to legislate. Here is the original authority in the organic law, and here is the act of Congress made
36 in pursuance of that law. Here are the decisions of the Supreme Court fully ratifying and acknowledging the power, and there is the act of the legislature of Georgia making it appli-

cable to the particular lot in question here. It follows that the question is no longer debatable. To cite a case where land was vested in trustees or a corporation for a Soldier's Home is not to cite an apposite authority, because there was no title therein vested in the United States, and no cession to the United States. The trustees are like any other person, and the jurisdiction of the State was not divested at all there. But here, as the legislature had the right to cede title to the Government of the United States under the act of Congress and the Constitution, the only power which can exercise jurisdiction over this territory to punish any crime is the United States of America.

I wish very much that it were in my power to hold otherwise and transfer this weighty and important case to my brother of the State court, but this I have no power to do. The law is plain, and I must perform, as far as falls to my lot, the duty which the Constitution and laws impose upon me.

As to the other points of the demurrer they are fully answered by the district attorney. It is charged that the crime was maliciously done, unlawfully, and feloniously, and that is sufficient. It is not necessary to plead the act of the general assembly, because that is the general law, which it is presumed that not only the court but the defendant knew. Nor is it necessary to plead the title of the Government in the indictment. If the title is not shown in evidence, it may be possible that the Government's case will fall. On the whole, I have no doubt of the duty of the court to overrule the demurrer.

37 The following evidence was introduced upon the trial of the case, to wit, the evidence, a complete summary of which is set out in the court's charge to the jury, which is hereinafter set forth, and which summary the defendant accepts as a correct account of the evidence adduced upon the trial of said case. This was all the evidence in the case, and at its conclusion the defendant made the following motion to direct a verdict:

"Mr. COOPER. I move now that your honor direct a verdict of not guilty in this case on the ground that the Government has not proven any title to the property on which the Government building is now standing, that they have not proven whether the new building is on the lot ceded to the Government by the acts of 1885 and 1886 or whether the killing occurred on the new territory ceded by the State of Georgia to the United States Government by act of 1896.

"I move further that your honor direct a verdict on the ground that the Government has not shown exclusive jurisdiction to try this case. They have shown by the evidence that the United States Government has no jurisdiction over this man, and that the State of Georgia alone has jurisdiction to try him for this crime.

"On these grounds I move, your honor, to direct a verdict of not guilty. I do not care to argue the motion any further except to state the grounds.

"The COURT. Mr. Akerman, I only care to hear from you on the question of title.

"Mr. AKERMAN. May it please the court, the act cedes to the United States exclusive jurisdiction of a lot of land fronting 120 feet on Mulberry street and 130 feet on Third street. I have introduced the deeds from John S. Baxter which conveys a lot of the identical description as ceded in the ceding act, and accompanying the deed is a plat referred to and made a part of the deed, which shows the lot 120 feet on Mulberry and 130 feet on Third.

38 And I am absolutely clear that the court would take judicial cognizance of its jurisdiction without any proof.

"Kearney Wright was then sworn for the Government, who testified that he had been janitor of the Government building for eighteen (18) years, and he knew the Government had been in possession all that time.

"The COURT. The court will take judicial cognizance that it has held court in that building for eighteen years or thereabouts. The motion is overruled."

To the overruling of said motion to direct a verdict for the defendant counsel for the defendant then and there excepted.

39 During the progress of the trial the defendant offered the following evidence of the witness G. S. Wescott:

Q. Mr. Westcott, are you acquainted with the general character of Thomas Battle?

A. Yes, sir.

Q. How long have you known him?

A. About forty years; since I was a boy.

Q. What is his general character, good or bad?

(Objection by assistant U. S. attorney, on the ground that that is not the question, but the question is as to his character for peaceableness, quietness, and as a law-abiding citizen.)

The COURT. The court instructs you you are only entitled to prove his general character as to those features of character which are in issue in this particular trial. You can not prove his general character for honesty or general character for accuracy in business transactions.

You should ask him whether he knows his general character as a peaceable and law-abiding man, and restrict your inquiries to that. You can prove his general character as a peaceable and law-abiding man. The ruling of the court is the law.

The court excluded from the jury all evidence of general good character except that as a peaceable and law-abiding man.

The defendant then and there excepted to the ruling of the court in this restricting the examination and excluding the evidence of general good character except as so restricted.

During the progress of the trial the defendant offered the following evidence of the witness Theo. W. Ellis:

Q. Did you know the defendant in the war?

A. No, sir; I did not.

(Objection as irrelevant.)

The COURT. I do not see that his military record has got anything to do with the trial. You might just as well prove he was an astrologer.

Mr. COOPER. I want to prove his character from his childhood up.

40 The COURT. The court has ruled you are restricted to one question of being a peaceable and law-abiding man.

To thus restricting the examination and excluding the evidence the defendant then and there excepted.

41 During the argument of this case before the jury, and while prisoner's counsel was making his concluding argument to the jury he was interrupted by the court and the following colloquy took place between prisoner's counsel, Mr. Cooper, and Judge Emory Speer, presiding judge:

Defendant's counsel then and there excepted to the remarks of the trial judge to the effect that he was making a speech that was degrading to the administration of justice, and he now excepts to the remarks of the trial judge which was prejudicial to the rights of the accused.

42 JUNE 5, 1907.

(The arguments of counsel were begun, and Mr. Storrs opened the case on behalf of the Government. Upon the conclusion of his argument the court adjourned until 10 a. m. the following day.)

JUNE 6, 1907.

(At the opening of the court Mr. Cooper proceeded with the argument in behalf of the defendant. The following colloquies between the court and counsel during the course of his argument to the jury are material to this record:)

Mr. COOPER. He (Battle) is getting a legal trial; he is getting that from his honor on the bench. He is getting a trial, gentlemen of the jury, that the framers of the Constitution intended that every man charged with crime should get in the national courts of this country.

(Mr. Cooper then commented on the testimony in the case, referring to the colored witnesses introduced on behalf of the Government.)

Mr. COOPER (to the jury). You will believe a white man not on his oath before you will a negro who is sworn. You can swallow those niggers (referring to certain colored witnesses) if you want to, but John Randolph Cooper will never swallow them. (Mr. Cooper several times alluded to the Government's colored witnesses by the term of "nigger" and "coon," and upon the last occasion of the use of the latter term was interrupted by the court as follows:

43 Judge SPEER. Mr. Cooper, we are not accustomed to hearing such a continual refrain of "nigger, nigger, nigger" in this court, and I would greatly prefer if you would discuss these witnesses under the rules of evidence, without attempting to raise a race prejudice here. It is bad enough anyway.

Mr. COOPER. I will call them "colored men" then.

Judge SPEER. I do not care what you call them, but call them according to the rules of evidence. There may be those who will laugh at that sort of thing, but it is not appropriate in a court room.

Mr. COOPER. I am praising the negro now.

Judge SPEER. That is a very singular way of praising them.

Mr. COOPER. I am obliged to discuss their evidence.

Judge SPEER. Discuss their evidence, that is proper, they are sworn witnesses, and you are a sworn lawyer. You owe a duty to the court and to the country, and you owe the duty of making an argument that is not calculated to place the issues upon the lowest basis. There are white men on both sides as well as colored men in this case. There are white men and colored men on both sides who have agreed with each other, for instance, that your man Cheney, as you just stated, agreed with Hunt (a white witness). You say that Hunt told the truth, and Cheney told the truth.

Mr. COOPER. I am not saying anything against the negro,
44 I have defended more of them than any man in Georgia. I am only endeavoring to discuss my case. I have no malace against them.

Judge SPEER. Discuss your case without lugging in racial questions, which are not proper. There is no race problem in it.

Mr. COOPER. No, sir; I have no intention——

Judge SPEER. Proceed with your argument, Mr. Cooper.

Mr. COOPER. I do not know how to discuss this case without calling these men their names. I have no intention of hurting their feelings, and if I say anything in the heat of argument, I hope your honor will not send me to the Bibb County jail.

Judge SPEER. I am not threatening you with either fine or imprisonment, Mr. Cooper. I am simply asking you to make an argument which does not tend to degrade the administration of justice.

Mr. COOPER. If your honor believes I am doing that—I object, I except to your honor's remarks that I am making a speech that would degrade the administration of justice, because I have no intention to do so. I have been practicing law for many years, and I have never tried to disobey an order of the court.

Judge SPEER. Well, leave the race issue out of this case if you can.

Mr. COOPER. Yes, sir; I will. I have to discuss one more man by the name of Cheney.

Judge SPEER. He is your own witness?

Mr. COOPER. Yes, sir.

Judge SPEER. Well, go on.

45 *Charge to the jury.*

Judge SPEER. Gentlemen of the jury, Thomas Battle is on his trial charged with the murder of D. M. Berry. The indictment was found and returned into court by a grand jury at this term of this the

Circuit Court of the United States for the Western Division of the Southern District of Georgia. The offense is charged in two counts. These are as follows: In the first count it is charged:

"That on the 16th day of May, of this year, one Thomas Battle, within certain territory within the city of Macon, to wit, the land upon the corner of Third and Mulberry streets, jurisdiction over which had theretofore been ceded by the legislature of the State of Georgia to the United States of America for the erection of a public building to be used for the post-office, court-house, and other public purposes, and which territory was on the 16th of May then and there a place under the sole and exclusive jurisdiction of the United States, and out of the jurisdiction of any particular State, did then and there wilfully, unlawfully, deliberately, feloniously, and of his malice aforethought, with a certain iron bolt which he, the said Thomas Battle, then and there held in his hand, the said iron bolt then and there being an instrument likely to produce death, make an assault upon one D. M. Berry, whose further given name is to the grand jurors aforesaid unknown, he, the said D. M. Berry, being then and there in the peace of the United States, and did then and there strike the said D. M. Berry upon the head with the afore-
46 said iron bolt, thereby inflicting mortal wounds upon the said D. M. Berry, from the effects of which mortal wounds the said D. M. Berry did then and there die; and so the jurors aforesaid, upon their oaths aforesaid, do say that he, the said Thomas Battle, in the manner and form aforesaid, within the territory aforesaid, and out of the jurisdiction of any particular State, and within the jurisdiction of this court, wilfully, unlawfully, feloniously, and of his malice aforethought the said D. M. Berry did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States."

The second count, with the same averments as to time and place, charges that the defendant did "feloniously and with malice aforethought with a certain iron bolt which he then and there held in his hand, the same being an instrument likely to produce death, make an assault upon one D. M. Berry, and did then and there strike the said D. M. Berry upon the head with the aforesaid iron bolt, the effect of which blows did then and there cause the said D. M. Berry to fall from the top of the third story of the building then and there in course of erection violently to the ground, the effect of which fall did then and there break the neck of the said D. M. Berry, from which the said D. M. Berry did then and there die. And this likewise is charged to be murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

47 You have of course observed that the crime charged is alleged to have been committed upon land to which the United States had title, and on which exclusive jurisdiction has been ceded by the State of Georgia. You are instructed as a matter of law, and the law on this topic it is your duty to accept from and be guided

by the instructions of the court, that if the United States had title to the place or lot in question, and if you further find that such lot was being used for the erection of a needful public building of the United States thereon, viz, the post-office and court-house, as alleged in the indictment, since the State of Georgia has ceded to the United States exclusive jurisdiction thereon, the Circuit Court of the United States in which you are now empanelled has exclusive jurisdiction for the trial of the crimes committed on such lot, and no other court has such jurisdiction on such lot and on any edifice or building erected or in process of erection thereon. The deed under which the United States claims title is in evidence before you. The construction of the deeds and other instruments in writing also falls within the province of the court. You are instructed that this deed does convey title to the United States to the place or lot described in the indictment, and that the United States had title to such lot on the 16th day of May, and has title now. If you find from the evidence that on the date mentioned such lot was being used for the erection of a needful public building, the jurisdiction of the
48 court is complete. You are also instructed that when a building on a lot or place of which the United States has title, for which building an appropriation of the money of the United States has been made by act of Congress, in a particular locality of the United States, by such act of appropriation it is declared by law and determined to be a needful public building. And you are also instructed as a matter of law that such act of appropriation had antecedently to the date of the alleged crime mentioned in the indictment been made by acts of Congress. These appropriation acts are public laws of which the court takes judicial cognizance, and it is the duty of the jury to be guided by such law and laws as stated to them by the court. The law being as stated, the only fact necessary to give the court jurisdiction is this, was the lot or place at the time of the alleged crime being used for the purpose of erecting thereon a court-house and post-office of the United States? If you find from the evidence that this was true, then the court has jurisdiction to try the offense charged. The Government has the legal title to the lot or place; it is not in dispute that it was being used for the purpose of erecting a post-office and court-house thereon, as alleged in the indictment. Something was said during the argument or in the examination of witnesses to the effect that title to this property was in the contractors until the building was completed and turned over to the Government. This statement and contention, you are instructed, is wholly untenable, and as a matter of law is not correct.
49 Finding that the court has jurisdiction on such lot, your next inquiry will be, was the crime committed, as charged, upon the lot in question, where this court, as long as it is used for the purposes of such public building, as explained, has exclusive jurisdiction to try crimes committed thereon. To determine this you are first to inquire did the deceased come to his death within the boundaries of such lot or place. To do this you should look to

the evidence. The prosecution is under obligation to show this as an affirmative fact. You should bear in mind and consider the testimony of the witnesses as to the precise spot or locality where the deceased came to his death, the position of the scaffold, and the part thereof where the death wounds were inflicted, if they were so inflicted, and where he was caused to fall to his death, if he was so caused, as charged, and the spot where he died. If this was all within the boundaries of said lot or place, as alleged in the indictment, and to which I have hereinbefore referred, and if, as stated, you find said lot or place was being used for the purpose of the erection of a post-office and court-house of the United States in Macon, not only the jurisdiction of this court to inquire into the manner of such death would be complete, but no other court whatever could under the law as it exists have such jurisdiction. In this connection you will not only bear in mind the testimony of the witnesses, including Mr. Bloomburg, the supervising architect in charge, but you will consider the diagram which has been put in evidence, and
50 which the architect testifies to be true and correct. If, pursuant to these instructions, you find that the deceased came to his death at the time and in the place described in the indictment, your next inquiry will be, did he come to his death at the hands of Thomas Battle, and was that death, if thus inflicted, murder, as charged. What is murder? It may be defined as the unlawful killing of a human being in the peace of the United States by a person of sound memory and discretion, with malice aforethought, express or implied. The existence of malice is essential to the crime of murder. This term malice may in some cases denote general malevolence on the part of the accused, or unkindness of heart, or enmity toward a particular individual. But this is not its general signification in a legal sense. It imports rather the intent which is manifested by an unlawful and injurious act, committed without legal justification, which results in the death of its object. As an essential to the crime of murder it is admirably defined by the code of our own State, which declares that express malice is that deliberate intention unlawfully to take away the life of a fellow-creature, which is manifested by external circumstances capable of proof. Implied malice is there defined as follows: "Malice shall be implied where no considerable provocation appears, and where all of the circumstances of the killing show an abandoned and malignant heart." The term "deliberate" in the definition of express malice does not necessarily comprehend any considerable period of time. "To deliberate," said the Supreme Court of
51 Georgia, "is to reflect with a view to make a choice, and a reflection but for a minute is a sufficient deliberation." Again, it is declared by the same tribunal that "if the deliberate intention enter in the mind of the slayer a moment before he fired the shot it is sufficient." Where the death results from a blow by a deadly weapon, the same principle would be applicable. A death resulting

from an act done by the accused with implied malice is as much murder as if done with express malice. Now, implied malice, as stated, is where no considerable provocation occurs, and where all the circumstances of the killing show an abandoned and malignant heart. It is perhaps not essential, in view of the evidence in this case, to discuss generally the meaning of the term "no considerable provocation" as used in this definition, but it is the law of the United States, and the law of Georgia as well, that "provocation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder. Indeed, this precise language is taken from a section of our own code. The term "abandoned and malignant heart" in the sense of the law, as held by the Supreme Court of Georgia, may be evidenced by the use of a weapon or other appliance likely to produce death, and by brutal and bloodthirsty use of such instrumentality." These deliverances of eminent jurists of our own Supreme Appellate Tribunal are expressive of the general or common law, are coincident with the law of the United States, and are quite adequate
52 for our guidance here. The law of the United States under which we are proceeding does not establish or recognize the degrees of murder as is done in some States.

The pertinent provision on the subject of murder is as follows:

"Every person who commits murder—

"First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Or upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State;

"Or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots at any other person, of which striking, stabbing, wounding, poisoning, or shooting, such other person dies, either on land or at sea, within or without the United States, shall suffer death."

The more pertinent portion of that statute is this, every person who commits murder in any place in the exclusive jurisdiction of the United States shall suffer death. This was the law as it existed until January 15, 1897. It was then amended as follows:

"That in all cases where the accused is found guilty of the crime of murder or of rape under sections 5339 or 5345, Revised Statutes (which are the sections from which I have been reading), the jury may qualify their verdict by adding thereto 'without capital punishment:' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life."

This amendment to the law of murder confers the exclusive power upon the jury; that is, the power to add the words "without capital

punishment" to a verdict of murder. It does not even authorize the court to prescribe any rule defining or circumscribing the
53 exercise of this power. It commits the whole matter of its exercise to the judgment and the conscience of the jury. The power of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of the opinion that there are palliating or mitigating circumstances. It extends to every case in which, upon a view of the whole evidence, the jury is of the opinion that it would not be just or wise to impose capital punishment. How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed to weigh in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress "to the sound discretion of the jury, and of the jury alone."

It is moreover true that the charge of murder may include the charge of manslaughter. This is defined by the law of the United States as follows:

"Every person who within any of the places, or upon any of the waters described in section 5339, unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, stabbing, wounding, shooting, or other injury, such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

Now, I have sufficiently explained to you, I think, malice express and implied. The difference between murder and
54 manslaughter is this. In the first the killing is accompanied by malice express or implied. In the second, the killing is done without malice. Enough of the law of murder and manslaughter intended to enforce that supreme principle of human society, otherwise expressed in the language, "Thou shalt not kill."

The plea of the defendant, Thomas Battle, is "not guilty." This, with the charges in the indictment, which I have explained to you, present the issue which you by your verdict will determine. In all criminal cases the burden of proof is upon the prosecution. This imports that the Government is always under obligation to prove every fact necessary to substantiate the accusation the grand jury has preferred against the person accused. In logical sequence to this is the additional principle that the accused is presumed to be innocent until by the submission of proof the jury is satisfied that he is guilty as charged. These are simple and vital safeguards of liberty. They are fully recognized by the law. But the law is not framed exclusively for the protection of the accused. It has regard also to the interests of society. It follows, that while the burden of proof is on the prosecution, and while the accused is presumed to be innocent, yet when the weight of evidence considered as a whole satisfies the jury beyond

a reasonable doubt that the charge made in the indictment is true, the presumption of innocence is overcome, and in those courts
55 and communities where the laws are respected and observed the conviction is the legal and logical result. Now, it is important that you should understand the term "reasonable doubt." It does not import the mere possibility of doubt, because everything relating to human affairs and depending on human evidence is open to some possible or imaginary doubt. A reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they can not say they feel an abiding conviction to a moral certainty of the truth of the charge. By a reasonable doubt is not meant a strained or whimsical conjecture, but an actual sincere mental hesitation caused either by insufficient evidence or unsatisfactory evidence. The term evidence in this sense includes that offered on the part of the Government, and also that offered on the part of the accused. If then, including the testimony of the accused, who in these courts is permitted to give evidence under oath, upon a consideration of all the proof there is such a reasonable doubt remaining as I have described, the accused is entitled to the benefit of it by an acquittal. There can be, however, no reasonable doubt of a fact or conclusion if it has been clearly established by satisfactory proof. In this case the evidence has been mainly direct. Direct evidence is that which immediately points to the question at issue. It is positive in its character. It generally depends on the credibility and intelligence of the witnesses who testify to a knowledge of the facts.

56 Indirect or circumstantial evidence is that which tends to establish the contention only by proof of facts sustaining by their consistency the hypothesis claimed, or the contention insisted upon, and from which the jury may infer the fact. Evidence as to the existence of the fact is direct. Circumstantial evidence may consist of facts or a fact, which raises a logical inference as to the truth of a particular contention. To the extent that circumstantial evidence is involved, it must not only be consistent with the hypothesis of guilt, but guilt must be so clearly and satisfactorily sustained as to exclude every other reasonable hypothesis save that of guilt. At this point it may be convenient to point out that the only circumstantial evidence in this case, as recalled by the court, is the alleged existence of impressions made on the hat of the accused by the iron bolt, with which it is claimed that the defendant struck him, and the correspondence of these impressions with the threads cut on one end of the bolt, and further the testimony of Doctor Little to the effect that one or more of the fractures in the skull of the deceased were found under such impressions in the hat of the deceased, if the hat was placed on the back of the head. with the bow of the hatband on the right side of the head.

Having defined the crime and explained to you the rules which should govern you in the consideration of the evidence, we now

turn to the evidence itself. In this connection, it is proper to state that no such rule exists in the courts of the United States as
57 that which exists in the State court to the effect that the court can neither state or intimate to the jury what has or has not been proven. It is here by law made the duty of the judge to sum up the evidence to refresh the recollection of the jury, to call their attention to the material and important portions, and, if need be, to express an opinion as to its effect. This is, however, done in an advisory way, merely to assist the jury. The jury must find the facts for themselves; they make their own independent judgment. This is their exclusive province, and the obligation resting upon the court is to attempt to assist and not to control them.

The first witness introduced was Dr. W. J. Little, a physician and surgeon of Macon, Ga. He examined deceased at 5 or half-past 5, after he was killed. Berry, he said, was dead. He found three wounds on the back and side of the head. In two of the wounds the scalp was burst or torn in several directions, and on one of these wounds the soft parts or the skin and the skull showed fractures, a breakage depressed somewhat after the fashion of an eggshell broken. "My opinion is," he said, "that an instrument of that character (the bolt being exhibited to the witness) produced the wounds. * * * He had two depressed fractures over the back of the head. They would have appeared in themselves to have been fatal wounds. * * * I found that his neck was broken, probably at the 3rd and 4th vertabrae. * * * He had a wound on the hand as if it were scraped by some object, scratches, and quite
58 an extensive bruise over the right side. * * * It is my opinion his neck was broken in a fall. * * * The effect of such fall would have been immediate death. * * *" Witness made an examination of the hat in connection with the wounds. "I found that with the bow turned to the right, worn on the right side * * * the bruises on the hat corresponded with the bruises underneath on the head. I fitted the hat on the head. There were marks on there corresponding to the marks of the threads of an instrument like that, indented in the felt hat, and underneath the marks on the hat with the bow turned to the right * * * and set on the back of the head somewhat at an angle of, say, about 45 degrees to the head, those thread marks corresponded to the wounds. * * * These seemed like the threads of a tap or bolt. * * * Underneath them were the wounds on the head."

On cross-examination he testified that he could not swear that Mr. Battle put the marks there (the marks in the dust and on the hat). He testified, "I am not swearing anybody put it there. * * * I could swear (the hat) had the impress of an instrument. * * * If you will put that hat under a glass you will find there are impressions on it. * * * I think the fall from the building terminated his life. * * *" Witness would not positively swear, but said "wounds on the head would have probably been fatal. * * *" He said it was "possible the wounds on the head might have been produced in falling. The two wounds nearest the center of the head

approximated about 2½ inches. Underneath the skull those two wounds showed depressions, fractures, breakages of the skull.
59 * * * The depth of the skin at that area varies from a quarter to a half an inch, and the skull was depressed I suppose an eighth of an inch—knocked in. * * * The wound to the right of these two I was describing showed no fracture. * * * There were two fractures. * * * There was also a slight scratch over the eye. * * * The character of every wound on his body could have been made by a fall. * * * " He was asked, "And it is impossible * * * to tell * * * by what those wounds were made?" He answered, "Except from a hypothesis, yes." They could have been produced by any dull or blunt instrument, or substance—rock, stone, wood, iron, anything that is blunt.

Question. "Isn't it your opinion as an expert (that the wounds on the back of the head were caused by his falling to the ground)?"

Answer. "No, sir."

Witness could not swear what deceased was struck with, or what instrument made the wound.

Mrs. Berry was introduced. She identified the hat in evidence as the one owned by the deceased, and worn the day of the killing. She testified she was the wife of the deceased.

B. J. Hunt was the next witness. He testified that he was a carpenter and rigger on the new Government building. He knew the parties only a week or two, working on the building. When the difficulty occurred witness was on the top floor of the Government building, about 50 feet from Battle.

He said, "I was moving a heavy boom. I had just set up a derrick in the further corner of the building. * * * I did
60 not have men enough to move (the boom), and went down and asked Mr. Battle if he would let me have his men, and he said 'Certainly.'" There were not then enough men. "I went over to Mr. Berry, and he had two men helping him, and I asked him if he could loan me his two men. At that time he was on a plank, a 10-inch plank, down below the floor." He was lowering a post. He could not spare the two men, but would let witness have one, the one that was on top. The other was on a plank below. "I took the one, and had only just got over there, and had a little pinch bar, and was prying a heavy block off. * * * I noticed that Mr. Battle had just come up the elevator. He came up as I went over." This was on the top of the building—the floor of the fourth floor. Berry was underneath. There was a plank hanging on a rope and he was on the 10-inch plank sitting down getting a bolt out. "My attention was directed over there. They were talking to one another. I could not catch what Mr. Berry said, but I distinctly heard Mr. Battle call him the epithet which we have so frequently heard, three or four times. With that he tried to wrench a shovel away from the negro who was mixing mortar. He would not let him have it. Then he picked up a hoe. Mr. Berry in the mean time was clinging to one of the strands of the rope. * * * He

stood on this block, with one hand this way [showing] and was trying to get up, and I could see Mr. Battle jabbing him." This was with the hoe. "Mr. Berry dodged around the south side of the post, and was climbing up on the other side of the post.
61 Battle dropped the stick or hoe or whatever it was, and as Mr. Berry got on his hand and knees on the scaffold, the scaffold is 4 feet and 2 inches wide, as he got on his hands and knees like that [showing] just getting his balance, Battle struck him over the head with this 20-inch iron bolt." [Witness identified bolt from mark he had placed on it at the time.] Battle struck him twice. "The first time Mr. Berry fell over on his hands as if he were kind of dazed. * * * I tried to get over as rapidly as possible. * * * As he rose up Mr. Battle grabbed him and struck him over the head the second time. Battle tried to grab him as he was falling. He went out of my sight falling down below. * * * There were some 2 or 3 iron girders on the way down." Witness next saw the body in the basement. "He must have hit the beams, he could not very well have helped it. * * * Battle was on the east side, about the center of the building * * * in the rear about the middle of the building."

On cross-examination he testified that Berry was lying on his face, that he had not a thing against (Battle). Witness "did not hear Berry say a word, did not hear Berry call him the epithet mentioned." Berry did not strike at Battle with a wrench or anything. "I saw him (Berry) as he was climbing up to get on top of the scaffold, but he never was on his feet. * * * Berry was in the neighborhood of 30 years old, and weighed 150 or 155." Witness saw Battle tussle with a man as heavy as witness was (195 pounds); the man was a stone setter, and "gave him all he wanted."
62 Witness did not drink before the killing, until afterwards. Witness was on the northwest corner of the building. Witness was 50 feet away. He started toward Berry and Battle when he saw Battle hit him with the bolt, and got about 10 or 15 feet toward them. He did not hear the first difficulty. The first thing that attracted his attention Battle was trying to wrench a shovel out of the negro's hands. Witness never saw Berry's face to see if he was mad, and did not hear him say a word. He could tell about Battle because he was facing him. Berry was down below.

On examination by the court he testified: "Berry was trying to climb up the ropes." Berry "Had got on top on his hands and knees on the edge of the scaffold. His feet were hanging over the open space. After the first blow he fell over on his face. * * * The effect of the second blow was he just went over and that was all." Witness saw Battle give him a blow and a shove about the same time. He further testified that Battle jabbed at Berry with the hoe before he got on the scaffold. The first blow with the bolt was struck after he got on the scaffold.

The next witness was Alexander W. Blumberg. He testified that he was the superintendent of construction of public buildings under

the Treasury Department. He identified the diagram of the building and lot made by him as correct. He explained the location of the body; it was lying in the center of the little square on the diagram. "This indicates position of the tower in the building.
63 The heavy red indicates the original purchase site of the Government. * * * Dotted place is about 10 feet inside of the lot and original 120 feet." (Witness also explained location from photographs.)

J. W. McGinn testified he was a superintendent of construction for the Mankin Construction Company. He identified the location of the body, as in about the center of proposed tower. Told of the first altercation. Berry was in the act of guying a stick of timber in the tower. Battle had instructions from witness to remove some material from the second floor, and in doing this he had fouled one of the guy lines. "There were several words between Berry and Battle, and I asked Mr. Battle to go below, which he did." After that witness saw Battle at the head of the ladder with a stick possibly an inch or inch and a half wide. "I asked him what he was going to do, and he growled a little." Witness did not understand what he said. Berry at the time was just back of the corner post that he was lashing with the guys, about 20 feet away.

He testified that Battle had control of the common laborers. Berry had one or two men under him. Killing occurred shortly after the noon hour. Witness heard a few words between men before the killing. That was at the second story. "It was relative to the fouling of a line, crossing a line." They were not abusing each other. In answer to this question, "You say that these men were quarreling just a little while before
64 the killing occurred on the second story of the building, fussing at each other?" He said, "Just a few words. I only knew one word that was passed. Mr. Battle used that. I immediately requested Mr. Battle to go downstairs, down the ladder, which he did." Battle did not tell him Berry had been abusing him. That was between half or ¾ of an hour before the killing.

"Question. Is it possible that he could have received those wounds on the back of his head by striking against the beams?

"Answer. Not in my opinion from what I have seen in the past.

"Question. State whether or not the man in falling could have struck his head against any of those different beams.

"Answer. Why, it would be possible."

On redirect examination he testified: "It is 59 feet from top of building to cellar."

Berry Jones was a common laborer; he testified that he (Berry) was taking down a derrick or post. Witness was on the post below when he was killed. He saw some trouble between men in morning about 11 o'clock. Berry sent down to get a rope, tied the end of it to a post, and then he came down to tie it. "Mr. Battle was using the rope. Mr. Berry asked Mr. Battle for the rope. Mr. Battle cussed at him, and said he didn't have any rope. He used the epi-

thet which you have heard. Mr. Berry didn't say anything, but said, 'You are too old a man for me to quarrel at.' Mr. Berry got the rope and tied it around the post, and Mr. Battle sprung off and got a piece 1 by 3 to hit him. When he drawed it back, Mr. McGinn jumped in between them." Witness was on the post.

65 "I looked up and he had a hoe handle; Mr. Battle had the hoe handle jogging Mr. Berry in the side. First before that he tried to take a shovel out of Tom James's hands. * * * He had a hoe handle jogging Mr. Berry in the side. Mr. Berry had one hand holding to the guy rope. * * * Mr. Berry did not have anything in his hand." There was only one wrench, "I had the wrench," the witness said, "down below him. He dropped down the hoe, and picked up an iron bolt [identifying bolt]. * * * He drawed off and hit him three times, and the last time he (Berry) turned loose." Witness saw Berry as he went down. "His neck hit and his back hit the iron beams." He did not move when he hit the ground. "Mr. Battle cussed at him, and called him the epithet which you have heard, and said 'I started to kill you before dinner,' but Mr. McGinn wouldn't let him."

"Question. When were those words, before or after jogging him with the hoe?

"Answer. He called him those when he was jogging him."

Tom James testified his work was making mortar on the 16th day of May. His mortar board was on the 3rd floor. His mortar board was in about 6 or 7 feet of the post that Berry was on. Battle came to him and tried to grab his shovel, and said "'Tom, hand me your shovel.' I said, 'No, I won't give you my shovel.' On the right-hand side of me he grabbed up my hoe, and run to Mr. Berry, and jobbed him three times. Right after that, he took up the bolt, the iron bolt. He whammed him across the head with it (he hit him) three

66 times." Berry, he said, was down with the block and tackle to take up the mast. "When Mr. Battle tried to job at him, he was trying to make to him, but he never did get to him." Berry was standing on the 18th beam, making fast a block and tackle. Witness was within 6 or 7 feet of him. "The first time he hit him, he (Berry) tried to get to him, and he had to come around that 10 by 12 post. He had to climb around, but he never did get to him." Battle "hit him with that bolt again; when he fell his head came right down, and down he went backwards." "His head struck," the witness said, "and I turned my back on him. A few minutes after he fell, I looked down. * * * He had then struck in the basement." He was asked, "Did Mr. Berry have anything in his hands at all?" The answer was, "No, sir; he did not have anything at all." He did not have any use for a weapon.

On cross-examination he testified that Berry worked with a wrench, but he didn't have one at the time. He did not know what had become of it. "He didn't have any when I saw him, and I was within 6 or 7 feet of him." Witness would not say about any wrench being found by Berry's body, as he did not know anything about it.

Mr. Berry was on the 18th beam, making his sling fast to the 18th beam to take down the beam. He was asked: "Didn't you say that Mr. Berry was trying to come to Mr. Battle to hit him"

"Answer. I said when he hit him the first time he was making his way to him.

"Question. Wasn't he mad with him?

"Answer. I don't know.

67 "Question. He wasn't friendly; what was he making at him for?

"Answer. He had been jogging him, and any man would do that.

"Question. Mr. Berry was making at him to hit him?

"Answer. He didn't have anything to hit him.

"Question. Wasn't Mr. Berry making at Battle to hit him at the time he fell, or just before?

"Answer. I said he was reaching up to him; he had been jogging him; that is what I mean.

"Question. He had jogged at him with the hoe; they were fighting each other?

"Answer. No, sir.

"Question. They were mad?

"Answer. I don't know whether Mr. Berry was mad."

By the court, the witness was asked if Berry got any of his body on the scaffold. He answered, "He never did."

"Question. Didn't he get his hands?

"Answer. No, sir. * * * I am certain."

Battle had not been up there long when he tried to take the shovel. He did not hear them say anything except Battle asking him for the shovel.

He testified further that Battle got the bolt off the scaffold. It was left there because they had it driving the timbers. "They had been working with it. I can not tell which one of the hands had it." Mr. Berry did not have it in his hands, as far as witness knows.

This recital of testimony is, of course, an inadequate presentation to the minds of the jury. You gentlemen heard the testimony.

68 You will remember the appearance of the witnesses as they testified, the manner of giving their testimony, and you, more than any others, are qualified and empowered to determine whether or not they told the truth. You should consider the testimony of the witnesses for the defendant. First, he began by attempted proof of good character, and the first witness, as I recall, sworn for the defendant was Mr. G. S. Westcott. He testified: "I hae known the defendant for about forty years—ever since I was a boy." He was asked: "Do you know his general character as a peaceable and law-abiding man?"

"Answer. Well, you say his general character; so far as my knowledge goes I believe I know it.

"Question. Well, is it good?"

His answer was, "I will answer that question this way: Mr. Battle at himself, so far as I know and my experience with him, I always

found him a big-hearted, whole-souled—when at himself his character was good; while drunk I have known him to have difficulties with the police."

On cross-examination he testified, "I have known him about forty years. I have heard his general character as a peaceable man discussed in the community more since this unfortunate affair. I have always considered him a friend of mine. I don't know as I have ever heard of his getting into difficulties with the police, I have seen it. I remember one particular time on Cherry street when he was in a scuffle with three or four policemen, and I thought
69 cruelly treated by them. I will say this, if they were looking for a difficulty my knowledge of Battle is they would find it when they got hold of him. Tom Battle is a man that would fight, particularly if he was drunk, otherwise he was as peaceable a man as I know. I have heard of his having other difficulties than the one I mentioned on Cherry street, but I know very little about them. I remember the occurrence on Hines' corner," &c.

"I have observed his physical strength, in them days I didn't know a better man: he was a powerful man at that time. I never heard of his taking advantage of anybody."

Mr. Theo. W. Ellis, for defendant, testified: "I am acquainted with his general character as to peaceableness and a law-abiding citizen. It is good when he is sober and bad when he is drunk. I have known him since about the time of the war."

On cross-examination he testified: "I have heard of his having difficulties with the police when they would go to arrest him when he was drunk. He was not particularly violent on such occasions; he was a very strong man, and it would take a great many of them to control him. I have heard of that several times."

At this point the defendant abandoned for the time proof of general good character, for peaceableness, and for being a law-
70 abiding citizen, and introduced R. W. Cheney. And I am sure, gentlemen, that in view of the great importance of this case you will not weary if the court makes this lengthy summary of the evidence, but will bear in mind and give your close attention to all of it. This witness testified:

"I was present at the killing of Mr. Berry on the Government building. I was about as far from Mr. Battle as I am now; I suppose it was 6 or 8 yards. I saw what occurred. I had a fair view. I did not see the first difficulty on the lower floor. I was helping raise the boom, that was my business, with the derrick, and Mr. Battle he had a gang up on top where I was; I was with another man; I was working under Mr. Dan, the one that sets the stones, and Mr. Battle had a gang up on the same floor.

"Some one spoke and says, 'look yonder,' and I looked around. Mr. Battle was coming back from where he had jobbed him; Mr. Berry was down under the platform when he jobbed him and Mr. Battle was coming back and Mr. Berry was coming up. Mr. Berry got up on the platform and got on his knees with the monkey wrench

in his hand, and he leaned out and struck at Mr. Battle's foot in that direction, and got up on his knees, and Mr. Battle then hit him on the hand with the monkey wrench in his hand, and he drops the wrench: Mr. Berry reached his left hand for the wrench and Mr. Battle hit his hand, and about that time Mr. Berry tried to get up on his elbows, and Mr. Battle then hit him two quick licks on the head.

"I heard what Mr. Berry said to Mr. Battle; he called him the epithet previously mentioned; that was before he jobbed him.

71 "Both men were on the platform, Berry's toes hanging in the air, but his knees on the platform like this; when he struck him he was leaning to the right, and then he come back, and he leaned over on his left; seems they paused there for a minute and a half and tried to catch his foothold with his left foot, and he moved his left foot and failed to catch and dropped his head, and his hair fell in his face, and then he turned clean loose and went down beneath.

"Question. State whether or not both men were fighting.

"Answer. Yes, sir; they was fighting. The scaffold was about ten feet where Mr. Battle was and three or four planks where Mr. Berry was. Mr. Battle never struck him when he was down under the scaffold; he was on top of the scaffold reaching after him when he struck him. I don't know whether or not Mr. Berry was drinking. He was as fine a white man as I ever knew.

"Cross-examination:

"I talked to Mr. Battle in the jail last Sunday. I don't know Still Miller, &c.

"By the court:

"Question. You say you were six or eight yards away?

"Answer. Yes, sir; just about as far as from that window to where Mr. Battle is standing; maybe nine yards; somewhere along there.

"Question. You saw it all?

72 Answer. Yes, sir; I saw Mr. Battle and James, the mortar maker; I don't know what they were doing. I saw James when he stepped between Mr. Battle that way, but what they was doing I don't know. Mr. Battle was jobbing Mr. Berry with a hoe. He was jobbing him with the handle; it was the hoe they make mortar with. I didn't see him hit Mr. Berry; saw him jobbing him. Mr. Berry never done anything, but leaned towards him on the right that way. That was after the two quick licks. He turned back this way and worked his left foot and seemed trying to get a toe hold; that let him back, and he held on the platform with his elbows just so. He missed his toe holt he aimed to get and went down, and about the time his head got even with the platform, Mr. Battle grabbed him. In turning to the left he reached over so, with his toes hanging down in the hole, and then he reached over in that direction, and when he leaned back to the left seemed he laid there about a minute, a short while; seemed he wanted to look where he was

putting his foot, and all his hair fell in his face, and at that time he didn't have anything to catch with his foot and went down.

"When he turned to the left on the edge of the hole anyone could have pulled him back out of the hole; seemed everybody was amazed and nobody said nothing until he fell.

"I was working with Mr. Shea; I was behind him; he was at this corner; I was between him and Mr. Battle. I was in about five feet of Mr. Dan; I was in three or four feet of Mr. Dan."

73 By the humanity of the national law the defendant in a criminal trial is allowed to testify as a witness in his own behalf, and Mr. Battle, the defendant here, was sworn and testified. His testimony is that:

"On the day before this thing happened after work time I looked up and I saw a coat, and I taken the coat out and laid it on a log outside so if anybody come and claimed it they could get it, and the next day Berry came to me and told me I gave his coat to a negro and the negro wore it, and he commenced cursing me. This engineer helped him out, so did Hunt. I told them I didn't have nothing to do with it; the coat was left out there, and he been cursing me for that ever since; these three men, especially, Berry, Hunt, and Smith. I didn't know what way they would get the best of me, and my work was all over the building. I was in charge of all of the working hands in the building, and had to go all over it, and whenever I would pass him he would commence cursing me and calling me every kind of name.

"'Question. Just use the language he used.

"Answer Cursed me for the epithet which you gentlemen have heard, not once, but fifty times, and I would go on about my business, and not pay any attention to him. At the time Mr. Magin come up I was letting down timber and I was down below and couldn't go up on the elevator, and I had the board in my hand for no other purpose in the world but to tell the carpenter to

74 nail it on the ladder; that was my intention. The witness here swore I had a stick on my shoulder to hit him. I never had no such thing, never intended to hurt the man in my life. This man Hunt came down and asked me for my men. I told him certainly he could have my men, and sent all my men up, and then I went up. I went over to the mortar board. I had to look after the bricklayers, too, and Tom James was making mortar, and I says to him, 'You have to keep mortar for these bricklayers, and help that man with the boom.' That man Berry, I didn't know he was up there at all; he was standing on a beam about as wide as that, and about three thousand pounds weight, and it was not as high as I am from here to that scaffold, and he cursed at me, and I taken the shovel from Tom James. He got mad when I told him he would have to wait on the bricklayers. I told him he would have to wait on these two bricklayers, and I took the shovel, it was no trouble, from him and he got mad. James got mad right then, and this man was there and commenced cursing

me you know and abusing me for every name he could think of, and he got up, got up on the scaffold and made a lick at me, and I had the hoe in my hand and jobbed him off. He got back kinder against the wall. The wall was about this size. Where he was standing was a narrow place. I was nearer over to the mortar box, and then he made a lunge at me and flung the iron at me. I never had that iron in my hand. I got out of range and dodged behind the place and he made a lunge and slipped and fell down. Gentlemen of the jury, I had no more hand in the killing than any man on the jury to-day. I could have got off from there if I had wanted to go away; nothing in the world to prevent me. I come down the ladder and the superintendent asked me about it and I told him it was his own fault. I had no words. Mr. Blumberg come and said, 'Tom, you go with the officer.' I said, 'Certainly, I would rather go with the sheriff.'

"I had nothing to do with the killing no more than any man in this court room. I couldn't pick anything up; it would be impossible for me to hit a man underneath me, a man of my age.

"I am 70 or 73 years old. I don't know positively. I have been living in Macon most of my life. For the last three or four years I have been with Mr. Wright building railroads.

"I have been a skilled laborer, sir, ever since I was able to ride in the forks of the plow at home as a little boy with my people. I married here in 1867 and made this my home; my wife died in 1877, and I have been a widower ever since, and the children for the last two years have had to tie my shoes and help me in the room; I can't put on my shoes sometimes. My strength is failing; I can't do like I used to when I was younger 15 or 20 years ago; I can't put my shoe on; I can't stoop. They even put them on me at the jail—the other prisoners. They, swearing as they do, I couldn't hit anybody if I wanted to.

"Mr. Blumberg was very close on me putting in the concrete, but I knew more about concrete than he did. He was not against me that I know of. That man Hunt was, and Smith and Berry, all conspired to get me out of the way, and talked to the negroes. I seen them tell the negroes not to do what I told them, and especially when I got two or three Italians in there, trying to get them all against me. Tell them they ought not to work for an old [describing himself with the epithet which you have heard].

"I didn't have any trouble before with Mr. Berry; I didn't even know his name until I saw it in the paper. I don't associate with everybody. Down on the second floor he cussed me with the epithet which you have heard, and I told Mr. Magin to stop this man calling me such names, and he says 'Tom, you go below,' and I went down. That was three or four hours before he was killed. He looked like he wanted to be fussing with me all of the time, and I could see that this fellow Hunt and Smith were with him. He had been working there only that week. He asked me if he could get a job, and I says go to the superintendent.

"I have been working there ever since they first broke dirt. I had charge of all the laboring hands, and I had charge of the bricklayers. I don't know what Mr. Berry's position was; they put him to taking down some old timbers on the derrick that broke.

"As Berry was going up on the scaffold he cussed me with the epithet described.

"I never struck him; I couldn't bend to hit him. I never hit him three times over the head with that iron bolt; he threw that bolt at me. When Mr. Berry got on the scaffold he backed
77 against the wall and just made a lurch at me, and I stepped back and he missed his foot and fell down, and if I caught him I would have fell in the same hole.

"He was on the scaffold on his feet. I tried to catch him when he was falling, and if I had caught him I would be in the same fix. I reckon that scaffold was 50 feet above the ground. I never had any intention of killing Mr. Berry, no more than any man in this court-house to-day. He flung that piece of iron at me, and tried to catch my foot a couple of times. I just stepped back out of the way, and when he was coming at me with a lunge he missed his foot and fell down. I never killed Mr. Berry—the fall killed him. I was not able to compete with him in a fair fight—not with a five year old boy—I haven't the strength—age has taken my strength away. Before he cussed me I never did anything to him. I never carry anything after it is over. I never had any prejudice against him. I never knew his name until I seen it in the paper. He was a stronger man than me. That was about three o'clock."

In estimating the weight to be given to the testimony of Cheney, the jury should carefully compare and contrast his testimony with the testimony given by the three eye-witnesses of the alleged facts, who are introduced by the Government. They may contrast it also with the testimony of Battle himself given in his own behalf. You will recall that Cheney testified that the deceased, Berry, attained the edge of the platform on his hands and knees, with his feet
78 and a portion of his legs hanging over the 59 feet of the precipitous fall below him; that he rested on one hand, and struck at Mr. Battle's feet with a monkey wrench, which he held in the other; that he did not strike Mr. Battle, who jumped back out of his way, and who then struck Berry two quick blows on the head with the iron bolt. That was the testimony of Cheney. Battle himself testified that Berry got up on the platform, stood in an upright position, made at him and struck at him, threw the iron bolt at him, and was making a further assault on him with the wrench.

The credibility of witnesses is entirely for the consideration of the jury. You should consider important discrepancies, but those which are unimportant do not necessarily tend to impeach the credibility of witnesses who make them. It is rarely true that two men witness a difficulty and see it with exactly the same eyes or report it in exactly the same manner. If, however, the testimony of Battle and

Cheney presents such grave discrepancies that the jury can not reconcile them it is your duty to accept the testimony of that one who in your judgment told the truth, or if you are satisfied that neither told the truth as to the material facts, and that this was wilful and knowingly done, it may be your duty to exclude the testimony of both altogether. In this connection you should bear in mind the testimony of Cheney, that he was at the jail last Sunday in conference with Battle; that he saw Battle at the jail, and
79 his further testimony that he was within four or five feet of the witness Shea, and the testimony of Shea, that if this were true, Cheney must have been at least 60 feet from where Battle and Berry were at the time of the incidents which led to Berry's death. Battle claims by his testimony that he acted in self-defence. If he truly acted in self-defence, he can not be convicted of murder. It is your duty to carefully examine this contention and the testimony he offers in support of it. If you accept the testimony of Cheney as true, you will determine whether Battle was in such danger from Berry, who, on his hands and knees at the edge of the platform, was striking at his feet with the wrench, as would justify him in striking Berry over the head, as Cheney said he did, with two quick blows of the iron bolt. Nor can you properly fail to consider the testimony of all the witnesses who saw the incident except Battle himself, that before Berry had reached the platform, and while he was still suspended over a depth of about 59 feet to the bottom of the building, Battle was thrusting, or, to use the expression of witnesses, "jogging" at him with the hoe handle. If this is true, it would be an assault by Battle on Berry. You will inquire what was Battle's motive for this. Was it merely to inflict such injury upon Berry as would result from the thrust of the hoe handle, or was it his purpose to break his hold on the rope, so that the helpless man would fall to his death below. If you believe the statement of these witnesses that such an assault was made upon the
80 deceased, suspended as he was and helpless as he was under the circumstances, you may be justified if you think proper from the evidence in regarding this in itself as a deadly assault, and to that extent evidencial of express malice. This you should, of course, consider in connection with the proof which the Government has offered to show the subsequent connected assault with the iron bolt, 20 inches long, in evidence before you, its alleged effect on Berry, and the alleged immediate fall to certain and inevitable death. You could not convict the prisoner for the assault resulting from the jogging of the hoe, because it is charged in the indictment that death came from the blow with the bolt and from the falling which resulted therefrom, but if you find that an assault with the hoe handle was made, you may, if you think proper, taking into consideration all the other evidence in the case, determine whether or not it showed malice. Even if Berry had sustained no other injuries, if you take the testimony of Cheney to be true, what justification was there for Battle to strike him two blows with the iron bolt. The court

charges you that it could not be in the words which Cheney testifies that Berry used. "It is well settled," said the Supreme Court of the United States, "that mere words, however aggravating, are not sufficient to reduce a crime from murder to manslaughter." Was it the blow or blows which Cheney testifies were struck at Battle's feet, and which according to Cheney he easily avoided. The
81 law of self-defence is a law of necessity, and it is only danger that is deadly in its character, or that may produce great bodily harm, which will justify one in responding with a deadly attack. "It is clear," said the Supreme Court of the United States, "that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made upon the prisoner. It must also appear that the assault was such as to lead a reasonable person to believe that his life was in peril." Nor can the prisoner justifiably plead self-defence in taking the life of the deceased, if he himself unlawfully brought on the assault, which the deceased made on him.

If you are satisfied from the evidence that Battle was not justified in assaulting Berry with the hoe handle, as the latter was suspended by the rope in the air, and if then, because of that assault, Berry made up the rope toward him with a view of attaining a place of safety or to resent the assault with the hoe handle, and if you further find that Battle had all the advantage, because of the relative position of the parties, he, having thus unlawfully brought on the conflict, would not be justified in using a deadly weapon and in taking the life of his assailant. At most, if those facts are found as just stated, would the jury be justified in considering whether they had the legal effect to reduce the killing from murder to manslaughter.

Many witnesses have been sworn with a view to convince the jury that the defendant was a man of general good character as a
82 peaceable and law-abiding citizen. If the evidence in the opinion of the jury is sufficient to establish this fact such proof of good character is material for consideration of the jury. Proof of good character bearing upon the issue involved is always material. It may make that clear which seems doubtful. It may make that doubtful which seems clear. In certain cases it may exonerate the accused. It is therefore always proper and right for the jury to consider it when the proof is satisfactory. While that is true, proof of good character in the accused should not have the effect to exonerate him, if the jury are satisfied from all the evidence, including that of good character, beyond such a reasonable doubt as I have defined, that he is guilty as charged. Men previously of good character are often guilty of crime, and evidence of good character is therefore not necessarily conclusive in its legal effect. Moreover, in this case, it is incumbent upon the jury to carefully consider if the defense has clearly established a general good character as a peaceable and law-abiding man on the part of the defendant. In order to determine this, you should carefully consider the testimony of the several witnesses on this subject. Some of them had never heard anything to

his discredit in this respect. That of course is good as far as it goes. A number of these witnesses, however, were officials. One was national, another municipal, and the others county officials. Without attempting to state in detail the testimony of these public servants, while they all agreed that Battle was a man of good character
83 as a law-abiding and peaceable citizen, they all agreed that when drinking he would violently resist the officers of the law. One or more testified that whether sober or drunk he would instantly resent an insult. One said with some appearance of approbation that if you wanted to get a fight out of him you could do it very easily. Several testified that it took three or four police officers to put him on a dray and carry him to the city prison. These seemed to be within the general knowledge of those who testified. There is nothing in this evidence which reflects upon the veracity of these witnesses, but the jury are not obliged to accept their judgment of what constitutes a good character as a peaceable and law-abiding man. It is for the jury to determine whether a man who is quick and sudden as a fighter, who, more or less frequently, becomes intoxicated, and when intoxicated will put forth his strength with such violence to resist the enforcement of the law as to require a number of the officers of the law to subdue him and carry him to prison, is really and in truth the possessor of that good character as a peaceable and law-abiding man which should be considered by the jury as effecting their verdict. The jury may, if they think proper, conceive what they think is a good character as a peaceable and law-abiding man, and then determine whether the standard on this subject erected by these officials and others, is one to which the righteous, the virtuous, the law-abiding and the patriotic can with safety adopt.

84 It is also insisted as a ground of defense that the prisoner at the time of the killing, or death of Berry, as charged in the indictment, was insane. In the presence of this defense the entire evidence in the case must be such as to satisfy you beyond such a reasonable doubt as I have defined that the defendant was in fact a sane man. The burden is on the Government to show this, but this may as well be done by the evidence in its entirety, if it produces on your minds a moral and reasonable conviction that the defendant is sane, as if witnesses were introduced to testify to his sanity. In determining whether or not he is sane beyond a reasonable doubt, you may also consider the insufficiency of the defendant's testimony to show insanity, if such insufficiency exists as contrasted with the entire evidence in the case. You may also consider the bearing of the prisoner and the manner of his own testimony. The only evidence upon which the defense relies is the testimony of Mrs. Middlebrooks, the young woman who kept the boarding house where for some time past the prisoner has boarded. It is true that she stated that when the defendant left her house she did not think he was of sound mind. The evidence upon which she based this conclusion was that the defendant had chickens in the back yard, and that when she would go

out with him to feed the chickens he would quarrel at her, and say that she did not amount to much anyway, and after a while when he would meet her elsewhere he would be in an equable frame of mind. At another time at the table he exclaimed that the coffee was bad and that he would throw it out of the window, which he pro-
85 ceeded to do. She repeatedly referred to the partner of her matrimonial life as her "old husband," and said that he was very much afraid of dead men, and would not go about them; that two men had died upstairs in her boarding house, and that one had been burned to death, and that the defendant would in the morning say to her husband that he heard the dead men fighting upstairs last night, and wished that her husband had been there to go up with him and put an end to the conflict. But she said her husband would not go upstairs on any account; that he was exceedingly afraid of ghosts and dead men. She did not think her husband insane but pronounced him all right. If there is any other evidence tending to show the insanity of the defendant, the court does not recall it, but the jury must recall all of the evidence, and for themselves make up their minds on this as on every other issue in the case.

In conclusion, on the issues and evidence involved, as they may be morally and reasonably convinced from a consideration of the evidence beyond a reasonable doubt in this case, the jury, according to the conception of their duty, under their oaths, may find either one of several verdicts. If they find from the evidence that the Government has failed to make out the case as charged, or if they have that reasonable doubt which I have explained, as to whether the Government has done this, or if they think that the defendant has adequately met the case of the Government, it is in their power to acquit the defendant, in which case the verdict should be written on the indictment as follows: "We the jury find the defendant
86 not guilty." If convinced that the Government has made out its case beyond a reasonable doubt, they may find the defendant guilty of murder, and the verdict should be written on one or both counts of the indictment, as they may think proper from the evidence: "We the jury find the defendant guilty on the first, or second count, or on both counts, of the indictment, as charged." Third, they may write the verdict as follows: "We the jury find the defendant guilty of murder," and add to their verdict, the words "without capital punishment." Fourth, they may find: "We the jury find the defendant guilty of manslaughter."

Of course, what I say with regard to your power to make one or either of these verdicts is stated in connection with all the explanations I have attempted to give you of the law in the case, the rules for the conduct of the trial, the summing up of the evidence. I again remind you that you must find the evidence for yourselves, and that the summing up of the court is made to assist you, and not to control your independent judgments.

Feeling assured, gentlemen, that you appreciate to the full the solemnity of your inquiry and finding, and the supreme responsi-

bility you owe at once to the Government and to the accused, you are authorized to retire and enter upon your considerations.

Mr. COOPER. If your honor please, quote exceptions to the
87 charge, if your honor will not require me to state my grounds.

Judge SPEER. I will require you to comply with the law.

Mr. COOPER. I will note exceptions of the defendant to the charge—the whole charge.

Judge SPEER. Very well.

88 During the charge to the jury the court instructed the jury as follows:

(1) "You have, of course, observed that the crime charged is alleged to have been committed upon land to which the United States had title, and on which exclusive jurisdiction has been ceded by the State of Georgia. You are instructed as a matter of law, and the law on this topic it is your duty to accept from and be guided by the instructions of the court, that if the United States had title to the place or lot in question, and if you further find that such lot was being used for the erection of a needful public building of the United States thereon, viz, the post-office and court-house, as alleged in the indictment, since the State of Georgia has ceded to the United States exclusive jurisdiction thereon, the Circuit Court of the United States in which you are now empaneled has exclusive jurisdiction for the trial of the crimes committed on such lot, and no other court has such jurisdiction on such lot and any office or building erected or in process of erection thereon. The deed under which the United States claims title is in evidence before you. The construction of the deeds and other instruments in writing also falls within the province of the court. You are instructed that this deed does convey title to the United States to the place or lot described in the indictment, and that the United States had title to such lot on the 16th day of May, and has title now. If you find from the evidence that on the date mentioned such lot was being used for the erection of a needful public building, the jurisdiction of the court is complete."

The defendant then and there excepted to said charge of the court.

89 During the charge to the jury the court instructed the jury as follows:

(2) "You are also instructed that when a building on a lot or place of which the United States has title, for which building an appropriation of the money of the United States has been made by act of Congress, in a particular locality of the United States, by such act of appropriation it is declared by law and determined to be a needful public building. And you are also instructed as a matter of law that such act of appropriation had antecedently to the date of the alleged crime mentioned in the indictment been made by acts of Congress. These appropriation acts are public laws, of which the court takes judicial cognizance, and it is the duty of the jury to be

guided by such law and laws as stated to them by the court. The law being as stated, the only fact necessary to give the court jurisdiction is this, was the lot or place at the time of the alleged crime being used for the purpose of erecting thereon a court-house and post-office of the United States. If you find from the evidence that this was true, then the court has jurisdiction to try the offence charged. The Government has the legal title to the lot or place; it is not in dispute that it was being used for the purpose of erecting a post-office and court-house thereon, as alleged in the indictment. Something was said during the argument or in the examination of witnesses to the effect that title to this property was in the contractors until the building was completed and turned over to the Government. This statement and contention you are instructed is wholly untenable, and as matter of law is not correct."

The defendant then and there excepted to said charge of the court.

90 During the charge to the jury the court instructed the jury as follows:

(3) "It is perhaps not essential, in view of the evidence in this case, to discuss generally the meaning of the term 'no considerable provocation' as used in this definition, but it is the law of the United States, and the law of Georgia as well, that prov'cation by words, threats, menaces, or contemptuous gestures shall in no case be sufficient to free the person killed from the guilt and crime of murder.' Indeed, this precise language is taken from a section of our own code. The term 'abandoned and malignant heart' in the sence of the law as held by the Supreme Court of Georgia may be evidenced by the use of a weapon or other appliance likely to produce death, and by brutal and bloodthirsty use of such instrumentality."

The defendant then and there excepted to said charge of the court.

During the charge to the jury the court instructed the jury as follows:

(4) "Every person who within any of the places or upon any of the waters described in section 5339 unlawfully and wilfully, but without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of which striking, sta'bing, wounding, shooting, or other injury such other person dies, either on land or sea, within or without the United States, is guilty of the crime of manslaughter."

The defendant then and there contends and now contends that the verdict of the jury is contrary to this charge.

91 During the charge to the jury the court instructed the jury as follows:

(5) "You should consider the testimony of the witnesses for the defendant. First he began by attempted proof of good character; and the first witness, as I recall, sworn for the defendant was Mr. G. S. Westcott."

The defendant then and there excepted to said charge of the court.

During the charge to the jury the court instructed the jury as follows:

"It is well settled, said the Supreme Court of the United States, that mere words, however aggrevating, are not sufficient to reduce a crime from murder to manslaughter."

The defendant then and there excepted to said charge of the court.

During the charge to the jury the court instructed the jury as follows:

(6) "If you are satisfied from the evidence that Battle was not justifeied in assaulting Berry with the hoe handle as the latter was suspended by the rope in the air, and if then, because of that assault, Berry made up the rope towards him with a view of attaining a place of safety, or to resent the assault with the hoe handle, and if you further find that Battle had all the advantage because of relative position of the parties, he, having thus unlawfully brought on the conflict, would not be justified in using a deadly weapon and in taking the life of his assailant. At most, if those facts are found as just s'ated, would the jury be justified in considering whether they had the legal effect to reduce the killing from murder to manslaughter."

The defendant then and there excepted to said charge of the court.

92 During the trial, and before the jury retired to consider their verdict, the defendant requested the court in writing to give the following charge to the jury:

(7) "Gentlemen of the jury, if you believe in this case that the defendant got into an altercation with the deceased on top of the Government building in the city of Macon and they became engaged in a fight, and during that fight the deceased, Berry, lost his footing and fell 59 feet to the ground, breaking his neck, and that defendant tried to catch him in falling, and that he had no intention to kill and murder deceased, then, gentlemen, I charge you you would be authorized to find defendant only guilty of involuntary manslaughter in the commission of a lawful act."

The court refused to give this charge to the jury, to which ruling the defendant then and there excepted.

During the trial, and before the jury retired to consider their verdict, the defendant requested the court in writing to give the following charge to the jury:

(8) "That the burden is upon the Government throughout the entire case to prove the entire case, to prove every essential element of the case charged, and if you have any reasonable doubt, taking into consideration all the evidence that defendant, Thomas Battle, was sane at the time of the commission of the act charged, you will acquit. The real test, as I understand it, of liability or nonliability rests upon the proposition whether at the time the homicide was committed Battle had a diseased mind and brain, and it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent and the disease had so taken charge of his brain and had so impelled it that for the time being his will power, judgment, reflection, and center of his mental

faculties were impaired, so that the act done was irresistible
93 and uncontrollable impulse with him at the time he committed the act. If his brain was in this condition, he can not be punished by law. But if his brain was not in this condition he can be punished by law, remembering that the burden is upon the Government to establish that he was of sound mind; that by the term is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong, and knowing that the act was committed at the time he was performing it was a wrongful act, in violation of human law, and he could be punished therefor, and he did not perform the act because he was controlled by irresistible and uncontrolable impulse. In that state of the case the defendant could not be excused upon the ground of insanity and it would be your duty to convict him. But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain at the time he committed the act was impaired by disease and the homicide was the product of such disease, and that he was incapable of forming a criminal intent and he had no control over his faculties and the will power to control his actions, but simply slew Berry because he was laboring under a delusion which absolut'ly controlled him and that his act was one of irresistible impulse and not of judgment, in that event he would be entitled an acquittal."

The court refused to give this charge to the jury, to which ruling the defendant then and there excepted.

(9) During the trial, and before the jury retired to consider their verdict, the defendant orally requested the court to give in charge to the jury the law of justifiable homicide. The court refused this request, to which said ruling the defendant then and there excepted.

94 The jury retired and returned a verdict of guilty of murder, without capital punishment, upon the second count.

The defendant moved the court to grant him a new trial upon the grounds stated in his motion for new trial, which is a part of the record in the case. The court overruled said motion, to which ruling the defendant then and there excepted.

The defendant filed a motion in arrest of judgment in said case upon the grounds set forth in his written motion, which is a part of the record in said case. The court overruled said motion, to which ruling the defendant then and there excepted.

The court then sentenced the defendant to confinement at hard labor in the penitentiary of the United States at Atlanta, Georgia, for and during his natural life.

And now, in furtherance of justice and that right may be done, the defendant, Thomas Battle, tenders and presents the foregoing as his bill of exceptions in this case to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record.

This 11th day of July, 1907.

95 In signing the bill of exceptions presented in this case the court feels obliged to certify that there is much evidence in the case other than that presented in the judge's charge to the jury. It is true, however, that the more salient features of the evidence in behalf of the Government and the accused are set forth in the charge. It is also true that all of the evidence necessary to the determination of the question of jurisdiction is therein set forth or stated. But it is not a complete statement of the evidence offered and admitted on the trial.

In this bill of exceptions, as presented by defendant's counsel following the charge of the court and the colloquy between the court and Mr. Cooper, there are a number of exceptions to the charge. These are numbered 1, 2, 3, 4, 5, 6, 7, 8, and 9. These exceptions were not submitted to the court or noted in any manner before the jury retired, or thereafter until the bill was finally presented on the 11th day of July, 1907. All that occurred with relation to the exceptions to the charge appears in the following colloquy between Mr. Cooper and the court immediately after the charge was delivered:

Mr. COOPER. If your honor please, I note exceptions to the charge. Your honor will not require me to state my grounds?

Judge SPEER. I will require you to comply with the law.

Mr. COOPER. I will note exceptions of the defendant to the charge, to the whole charge.

Judge SPEER. Very well.

The exceptions set forth, thus numbered and referred to, were prepared and submitted to the court more than a month after the trial was ended. It is true that defendant, through his counsel, excepted to the refusal of the court to grant a new trial and the action of the court in overruling his motion in arrest of judgment. It is true that the defendant's counsel excepted to the refusal of the court to direct a verdict of not guilty on the grounds therein stated.

Understanding that this corrective and explanatory note is incorporated in the bill of exceptions, it is allowed and ordered filed as part of the record in said case. This 11th day of July, 1907.

JOHN RANDOLPH COOPER,
Defendant's Attorney.
EMORY SPEER, *U. S. Judge.*

Filed July 11, 1907.

L. M. ERWIN, *Deputy Clerk.*

96 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

UNITED STATES *vs.* THOMAS BATTLE. } Number 414. Assignments of error. Amendments thereto.

Now comes Thomas Battle, defendant in the above-stated case, and moves to amend his assignments of errors on the following grounds:

28. Because the Circuit Court committed error in holding that the alleged crime was committed within the jurisdiction of the United States.

JOHN RANDOLPH COOPER,
Attorney of Thomas Battle.

Filed July 19, 1907.

CECIL MORGAN, *Deputy Clerk.*

97 In the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

THE UNITED STATES *vs.* THOMAS BATTLE. } Number 414.

Amendment to bill of exceptions.

The undersigned United States district judge, holding the Circuit Court for the Western Division of the Southern District of Georgia, having on the 11th day of July, 1907, signed and certified a bill of exceptions in the above-entitled cause, in which certificate to said bill of exceptions, among other things, it was stated:

"It is also true that all of the evidence necessary to the determination of the question of jurisdiction is therein set forth or stated,"

and now during the same term of the court at which said case was tried, and before the adjournment thereof, and before the transcript in said case on writ of error to the Supreme Court of the United States has been certified and sent up, it appearing to the court that certain material evidence on the question of jurisdiction and venue was inadvertently omitted from said bill of exceptions, it is ordered by the court that said bill of exceptions be amended by adding thereto the following:

"The assistant United States attorney tendered in evidence a warranty deed from John S. Baxter to the United States of America, dated the 14th day of August, 1885, properly attested and recorded in the clerk's office of Bibb Superior Court on the 15th day of August, 1885, in book 'KK' of deeds, folios 569, 570, and 571,
98 conveying to the said United States of America the following-described property: All that tract or parcel of land situate and being in the city of Macon, county of Bibb, and State of Georgia, containing four-ninths of an acre, more or less, and being part of lots known and described in the plan of said city of Macon by numbers 3 and 4, and in square number 18, and of the width of 120 feet on Mulberry street, running southeast from the corner of said lot hereby granted, and of the depth of 140 feet, with even width on Third street, running northeast from said corner, and the same being on the northeast corner of the said Mulberry and Third streets, as shown by a plat of the same hereunto annexed, bounded by Mulberry street, by Third street, and by portions of said lots numbered 3 and 4 not included in this grant."